

PROPOSED CONSTITUTIONAL AMENDMENT TO PERMIT VOLUNTARY PRAYER

HEARINGS BEFORE THE COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

S.J. Res. 199

A SENATE JOINT RESOLUTION PROPOSING AN AMENDMENT TO THE
CONSTITUTION OF THE UNITED STATES

JULY 29, AUG. 18, AND SEPT. 16, 1982

Serial No. J-97-129

Printed for the use of the Committee on the Judiciary



U.S. GOVERNMENT PRINTING OFFICE

11-323 O

WASHINGTON : 1982

5521-26

COMMITTEE ON THE JUDICIARY

STROM THURMOND, South Carolina, *Chairman*

CHARLES McC. MATHIAS, Jr., Maryland

PAUL LAXALT, Nevada

ORRIN G. HATCH, Utah

ROBERT DOLE, Kansas

ALAN K. SIMPSON, Wyoming

JOHN P. EAST, North Carolina

CHARLES E. GRASSLEY, Iowa

JEREMIAH DENTON, Alabama

ARLEN SPECTER, Pennsylvania

JOSEPH R. BIDEN, Jr., Delaware

EDWARD M. KENNEDY, Massachusetts

ROBERT C. BYRD, West Virginia

HOWARD M. METZENBAUM, Ohio

DENNIS DeCONCINI, Arizona

PATRICK J. LEAHY, Vermont

MAX BAUCUS, Montana

HOWELL HEFLIN, Alabama

VINTON DeVANE LIDE, *Chief Counsel and Staff Director*

MARK H. GITENSTEIN, *Minority Chief Counsel*

CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

Thurmond, Chairman Strom.....	Page 1, 227, 341
Heflin, Howell.....	69
Grassley, Charles E.....	139, 263
Byrd, Robert C.....	263

PROPOSED LEGISLATION

Test of S.J. Res. 199—Proposing an amendment to the Constitution of the United States.....	3
--	---

CHRONOLOGICAL LIST OF WITNESSES

THURSDAY, JULY 29, 1982

Hatfield, Hon. Mark O., a U.S. Senator from the State of Oregon.....	6
Helms, Hon. Jesse, a U.S. Senator from the State of North Carolina.....	19
Siegel, Rabbi Seymour, Jewish Theological Seminary of America; John M. Murphy, deputy supreme knight, Knights of Columbus, New Haven, Conn.; and Robert Dugan, Jr., director, National Association of Evangelicals, Washington, D.C.....	67
McAteer, Ed, Religious Roundtable, Arlington, Va.; and Gary Jarmin, director, Project Prayer, Washington, D.C.....	141
Kelley, Rev. Dean, director for religious and civil liberty, of National Council of Churches, New York, N.Y.; Dr. Jimmy R. Allen, president, radio and television commission of the Southern Baptist Convention, Fort Worth, Tex.; Dr. Charles Bergstrom, executive director, office of governmental affairs, Lutheran Council in the U.S.A., Washington, D.C.; and Nathan Z. Dershowitz, director of commission on law and social action, American Jewish Congress, New York, N.Y.....	159
Kindness, Hon. Thomas, a U.S. Representative from the State of Ohio.....	164

WEDNESDAY, AUGUST 18, 1982

Neal, Hon. Stephen L., a U.S. Representative from the State of North Carolina.....	227
Schmults, Hon. Edward C., Deputy Attorney General of the United States; accompanied by Hon. Bruce Fein, Associate Deputy Attorney General of the United States.....	240
Robertson, M. G. "Pat", president, Christian Broadcast Network, Inc., Virginia Beach, Va.....	264
McGuire, Willard H., president, National Education Association, Washington, D.C.; and Joanne Goldsmith, executive director, National Coalition for Public Education and Religious Liberty, Washington, D.C.....	280
Corman, Hon. James, representing Americans United for Separation of Church and State, Silver Spring, Md.; George E. Bushnell, representing the general assembly of the United Presbyterian Church, New York, N.Y.; Hon. John Buchanan, representing People for the American Way, Washington, D.C.; George Ogle, program director, general board of church and society, the United Methodist Church, Washington, D.C.....	298

THURSDAY, SEPTEMBER 16, 1982

Meyer, Hermine Herta, attorney, Chevy Chase, Md.; accompanied by Mary Elizabeth Bull, president, Maryland Interfaith Committee for School Prayers, Chevy Chase, Md.; James M. Smart, Jr., attorney, Smart & Whitenhead, Kansas City, Mo.; Grover Rees, University of Texas Law School, Austin, Tex.....	Page 342
Sandalow, Dean Terrance, University of Michigan Law School, Ann Arbor, Mich.; Prof. Geoffrey R. Stone, University of Chicago Law School, Chicago, Ill.; Dean Norman Redlich, New York University School of Law, New York, N.Y.; Prof. Paul Bender, University of Pennsylvania Law School, Philadelphia, Pa.; and Prof. William W. Van Alstyne, Duke University of Law, Durham, N.C.....	380

ALPHABETICAL LISTING AND MATERIALS SUBMITTED

Allen, Rev. Jimmy R.: Testimony	161
Prepared statement	197
Bender, Prof. Paul: Testimony	385
Prepared statement	454
Bergstrom, Dr. Charles: Testimony	166
Prepared statement	203
Buchanan, John H., Jr.: Testimony	301
Prepared statement	320
Articles	326
Bull, Mary Elizabeth: Testimony	349
Bushnell, George E.: Testimony	299
Prepared statement	312
Resolution on proposed prayer amendment adopted on June 28, 1982 by the 194th general assembly of the United Presbyterian Church.....	319
Corman, James C.: Testimony	298
Prepared statement	306
Denton, Sen. Jeremiah: Copy of the President's proposed amendment.....	77
Legal analysis of the amendment prepared by the Justice Department's Office of Legal Policy.....	81
Questions and answers relating to the amendment	115
Dershowitz, Nathan Z.: Testimony	169
Prepared statement	206
Dugan, Robert, Jr.: Testimony	70
Prepared statement	134
Goldsmith, Joanne: Testimony	282
Prepared statement	294
Hatfield, Sen. Mark O.: Testimony	6
Memorandum re the <i>Widmar v. Vincent</i> decision	8
Helms, Sen. Jesse: Testimony	19
Prepared statement	21
"The Making and the Unmaking of the Establishment Clause," by James McClellan, from the Free Congress Research & Education Foundation ...	31
"Congressional Retraction of Federal Court Jurisdiction Over the Reserved Powers of the States: The Helms Prayer Bill and a Return to First Principles," by James McClellan, from 27 Villanova Law Review, 1982	62
Jarmin, Gary: Testimony	141
Prepared statement	153

Jarmin, Gary—Continued	Page
"Defending the School Prayer Amendment," by Grover Rees III, from the Wall Street Journal, July 22, 1982.....	157
Kelley, Rev. Dean M.:	
Testimony	159
Prepared statement	182
"The Churches and the Public Schools," a policy statement of the Nation- al Council of the Churches of Christ in the U.S.A., dated June 7, 1963....	193
"Opposition to the Christian Amendment Proposal, a policy statement, dated June 4, 1959.....	195
Resolution on prayer in public schools, adopted May 13, 1982	196
Kindness, Congressman Thomas: Testimony	164
McAteer, Ed:	
Testimony	141
Prepared statement	149
McGuire, Willard H.:	
Testimony	280
Prepared statement	286
Attachments	291
Meyer, Hermine Herta:	
Testimony	342
Prepared statement	351
Murphy, John M.:	
Testimony	69
Prepared statement	133
Neal, Congressman Stephen L.:	
Testimony	227
Text of H. Con. Res. 1.....	231
Ogle, George: Testimony.....	303
Redlich, Norman:	
Testimony	384
Prepared statement	444
Rees, Grover:	
Testimony	347
Prepared statement	370
Memorandum re silent prayers and the Federal courts.....	391
Robertson, M. G. "Pat":	
Testimony	264
Prepared statement	273
Sandalow, Dean Terrance:	
Testimony	380
Prepared statement	406
Schmults, Hon. Edward C.:	
Testimony	240
Prepared statement	253
Summary of President Reagan's message on school prayer	262
Siegel, Rabbi Seymour:	
Testimony	67
Prepared statement	128
Smart, James M., Jr.:	
Testimony	346
Prepared statement	363
Stone, Geoffrey R.:	
Testimony	382
Prepared statement	414
Van Alstyne, William W.:	
Testimony	387
Prepared statement	458

APPENDIX

Prepared statement by Rodney K. Smith	469
---	-----

PROPOSED CONSTITUTIONAL AMENDMENT TO PERMIT VOLUNTARY PRAYER

THURSDAY, JULY 29, 1982

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to call, at 9:38 a.m. in room 2228 of the Dirksen Senate Office Building, Hon. Strom Thurmond (committee chairman) presiding.

Present: Senators Denton, Grassley, Heflin, Metzenbaum, and DeConcini.

Staff present: Eric Hultman, general counsel, and Karl R. Moor, professional staff member.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee will come to order. This morning the committee commences hearings on Senate Joint Resolution 199, a proposed constitutional amendment to permit voluntary prayer.

On May 17, 1982, President Reagan sent to the Congress a proposal for a constitutional amendment to restore voluntary prayer to our public schools and public institutions. That amendment reads as follows:

Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any State to participate in prayer.

I was pleased to introduce this amendment, on behalf of myself and Senator Hatch, on May 18.

The President, in submitting this proposed constitutional amendment, made clear his reason for supporting and submitting it to the Congress when he stated:

The public expression through prayer of our faith in God is a fundamental part of our American heritage and a privilege which should not be excluded by law from any American school, public or private.

President Reagan has, in my view, correctly and courageously acknowledged what is recognized to be a vital part of our American Government.

The evidence that we are a religious people surrounds us—in our coinage, in our national anthem, in our pledge of allegiance. As President pro tempore of the Senate, I have the privilege of opening the Senate each day that it is in session. My first act after calling the Senate to order is to recognize the Chaplain of the Senate, who offers our opening prayer. That has been a tradition in the

Senate for its entire history, and I expect it to continue to be in the future.

When I preside over the Senate and look at the lintel over the rear of the Chamber, there are four brief words inscribed on it: "In God We Trust." Our Nation is founded on that premise and our faith in God, expressed through prayer, is richly engrained in American history.

Now, public opinion favors voluntary prayer. The American people are openly and overwhelmingly in favor of allowing prayer in our public schools. Several polls taken recently by leading pollsters in America indicated the following results: 80 percent of those polled approved of allowing prayers in public schools; 73 percent agreed that the Supreme Court and Congress have gone too far in keeping religious and moral values like prayer out of our laws, our schools, and our lives; and 71 percent favored a constitutional amendment to allow daily prayers to be recited in school classrooms.

There are few issues in my many years in the Senate which have commanded such strong and clear support by the American people. I believe that we in Congress, therefore, have a responsibility to address this very important matter.

Now, the legal basis for the amendment. The first amendment to the Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

Most constitutional commentators agree that this language was intended to prevent any national ecclesiastical establishment and leave each State free to define the meaning of religious establishment under its own constitution and laws. Over the years, however, as a result of interpretation in the Supreme Court, the true meaning of these simple and straightforward words has become lost.

The Supreme Court, until 1947, did not have the occasion to interpret the first amendment in a manner contrary to the intention of the Founding Fathers, as recognized by most constitutional scholars. However, in 1947, the Court decided the case of *Everson v. Board of Education* which held that the 14th amendment makes the 1st amendment apply to States and set out the "wall of separation" doctrine. Later, in 1962, the Court in *Engel v. Vitale* struck down the reading of a prayer before the start of school each day on the basis that it was a "breach of the wall of separation of church and state." Thus, the Supreme Court set down a test which has confined the Court ever since. In *Board of Education v. Allen* (1968), the Court utilized a "child benefit" theory to approve the loan of secular textbooks to both secular and parochial schools. In short, the books were given to the students, not the schools; therefore, it was constitutional.

In deciding the *Everson* case in 1947, the Supreme Court in effect usurped the constitutional authority of the States over church-state relations. Scholars have argued that this decision and the subsequent line of cases are contrary to the intent of the framers of the Constitution. The 14th amendment was not intended to be used to change the meaning of the establishment clause. Also, mandating that public institutions be religiously neutral denies individuals

who hold religious beliefs the opportunity to exercise their beliefs in the form of prayer which, if voluntary in nature, could be accomplished without the involvement of the faculty, school administrators, or other students who do not wish to participate.

Now, as to possible congressional action, a constitutional amendment which would reverse the limitation of the Supreme Court on the exercise of religion is one way for the Congress to proceed. Obviously, that is the approach on which we will be focusing today. Some scholars argue, however, that limitations on court jurisdiction in the area of school prayer is the only sure way to address the Supreme Court's interpretation of the first amendment in this area. This approach can be defended on the basis of article III of the Constitution which states that the Court has appellate jurisdiction "with such exceptions and under such regulations as Congress shall make." Congress has the constitutional authority to create and abolish inferior Federal courts and has plenary power over the appellate jurisdiction of the Supreme Court.

The proposed constitutional amendment which we are considering today would reinstate what is, in my opinion, the original intent of the Founding Fathers. It permits individual and group prayer in public schools and other Government-owned institutions. It makes absolutely clear that no person shall be required to participate in prayer. It is unfortunate, but apparently necessary, for Congress to resort to an amendment to the Constitution to reinstate the true meaning of the first amendment.

[A copy of Senate Joint Resolution 199 follows:]

SENATE JOINT RESOLUTION 199—PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is hereby proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution if ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress:

"ARTICLE —

"Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any State to participate in prayer."

Senator THURMOND. I would like to thank all of our distinguished witnesses for agreeing to testify before the committee today. I am certain that your testimony will be of great assistance to the committee in its consideration of this important measure.

Finally, I would like to thank my friend and colleague, Senator Denton, for agreeing to chair these hearings; and I commend him for his strong and abiding interest in this issue.

I am engaged as floor manager of the constitutional amendment that is now under consideration in the Senate, to balance the budget, and I appreciate Senator Denton agreeing to chair these hearings.

Senator Denton, if you will now take over, I will return to the floor.

[Senator Denton assumed the Chair.]

Senator DENTON. Thank you very much, Mr. Chairman. I want to express my appreciation to you, as well as my admiration—my appreciation for the privilege of being requested to chair this hearing. I want to welcome my Democratic colleagues, and friends, Senators Metzenbaum and DeConcini, and to welcome all those present and thank our witnesses for coming here today to testify on President Reagan's proposed constitutional amendment to allow voluntary prayer in public schools and institutions.

Other members of the Judiciary Committee and I anticipate early Senate action on this measure. I believe this hearing will help us understand the constitutional and religious issues involved in the consideration of the amendment or any similar measure. My colleagues and I will listen closely and examine carefully the testimony offered today; we will carefully weigh the efficacy and wisdom of enacting the proposal that the President has put forward. That proposal is laid out in two sentences, and I quote them:

Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States, or by any State, to participate in prayer.

At this time I would like to welcome Senators Helms and Hatfield.

Would you gentlemen care to be at the witness table or where you are, at your discretion?

Senator METZENBAUM. Would the Chairman acknowledge the presence of some Democrats?

Senator DENTON. Yes, sir, I didn't make an opening statement, but—I did acknowledge you already, sir. If you wish to make an opening statement before our witnesses give theirs, please proceed.

Senator METZENBAUM. I do not come here with any formal opening statement, and I am not going to be able to stay here because I am due to testify before another committee. But I came in order that I might express my concern about what I consider to be the constant effort to erode the Constitution of the United States. I see it on the floor of the Senate, I hear proposals to deny the Supreme Court and the Court's jurisdiction in connection with certain controversial issues, and now we have here a new proposal, which is not actually new, but another proposal that certainly would do violence to the time-honored recognition of separation of church and state.

It's a very controversial kind of proposal, a particularly emotional one. Politically, it's not a very desirable one to speak out about. But the facts are that there also are some issues of conscience, and to me this is an issue of conscience.

It is very easy to wave the flag and it is also very easy to be moralistic and to emphasize our religiosity. It is very difficult at times to speak out for the Bill of Rights, because, as some have indicated on previous occasions, they probably couldn't be passed if you were to take a Gallup poll or a Harris poll at the present time.

But that is really not the issue.

The issue really has to do with the individual liberty of children in schools, and has to do with this long-recognized determination, that religion and the state will not be combined in our public institutions. A matter of this kind is a very challenging one for all of us

who hold political office or offer ourselves as candidates, because I don't doubt the fact that the polls indicate that the American people say, yes, that's great. But as I think one of the early witnesses will state, "you don't create morality by having a prayer in the school." That is a paraphrasing but I think it captures what he is stating.

It certainly does impact upon the right of that child, the embarrassment that comes about when he or she is called upon to join his or her fellow students in a prayer which very well may not be of that child's choosing.

I respect the President and those who support this amendment, but I have greater respect for the Constitution of the United States, and I believe it is they against the Constitution that is the issue before us. It is not an easy issue, but it is one that I don't believe serves our Nation's interest to change the thrust of our constitutional prohibitions that were there from the very inception.

Thank you.

Senator DENTON. Thank you, Senator Metzenbaum. Senator DeConcini, would you care to make an opening statement?

Senator DECONCINI. Mr. Chairman, thank you very much. Let me compliment you, Mr. Chairman, and the chairman of the Judiciary Committee, for holding these hearings. I think the Senator from Ohio is certainly correct that we need to move very cautiously on constitutional amendments in general. I regret that I cannot be here through the balance of the hearing, because I am managing Senate Joint Resolution 58, the constitutional amendment to balance the budget, for the Democratic side of the aisle.

This is a very important subject, and I have consistently supported voluntary prayer. I will review the testimony given here by proponents and opponents and neutral parties, if there are such, to question the voluntariness of this amendment and how it would be implemented and interpreted.

I look forward, Mr. Chairman, to the remainder of these hearings. I think it is vital that we address this problem. I am not afraid to address constitutional matters at all. I think it is part of the obligation and responsibility of Congress to look at these things head on and to find a consensus, and if there is justification for constitutional amendments, that is our duty; we ought not to shy away, like something that is sitting on the stove for hours and is so hot that we cannot touch it. Sure, it's nice to have these things go away and not be confronted with social issues and issues that do deal with the fundamental rights of individuals of our country. However, one of the responsibilities of public office is not to be frightened to address these issues but to listen, study, and make some determinations and ultimately cast a vote for what our conscience and constituents may call.

So I thank you, Mr. Chairman.

Senator DENTON. Thank you, Senator DeConcini. I share your and Senator Metzenbaum's caution in approaching the issue of a possible constitutional amendment. I will, as you appear to do, withhold my own present views regarding this subject until after we have heard from our witnesses. I daresay there will be sufficient opportunity for us to disclose our opinions on this issue as we proceed.

We have two extremely distinguished Senators who wish to testify this morning, and, in observing the convention, we will ask them to precede the other witnesses. I will ask Senator Hatfield and Senator Helms, if they care to sit at this table, or sit where they are, as they wish.

Senator Hatfield and Senator Helms, I will defer to the senior Senator and, with Senator Helms' acquiescence, request Senator Hatfield to proceed with his statement.

**STATEMENT OF HON. MARK O. HATFIELD, A U.S. SENATOR FROM
THE STATE OF OREGON**

Senator HATFIELD. Thank you very much, Mr. Chairman, Senator DeConcini.

I am very appreciative of the opportunity to be here to express a few thoughts this morning on this very important issue that confronts this committee, and I am delighted to be here in company with my colleague from North Carolina, Senator Helms.

Mr. Chairman, in 1962 the Supreme Court invalidated a non-denominational prayer that had been written by the New York Board of Regents and approved by local school boards. By imposing a watered-down prayer on young students, the New York Regents adopted a useless gesture that was neither spiritual nor prayer.

Since that decision, the Supreme Court's ruling has been blamed for the deteriorating quality of public education, for the breakdown of the American family, for the decay in moral principles and abdication of governmental institutions to the norm of secular humanism. The school prayer decision has served as a symbol for all that is wrong in America. Prayer amendments to the U.S. Constitution, legislative initiatives, and even attempts to remove the jurisdiction of the U.S. Supreme Court have been vigorously pursued in the Congress. Most recently, President Reagan submitted his proposed constitutional amendment which would allow voluntary prayer in public schools.

Mr. Chairman, I strongly believe that this Nation needs to have a spiritual renaissance, one that begins in the hearts and the minds of individuals and works its way through our churches, schools, and public institutions. The first amendment to the U.S. Constitution is a limitation on the power of government to promote, establish, or discourage religion, but it sets no limit on privately initiated prayer, observances of religious customs, or political action that stems from moral beliefs. Instead of concentrating our attention on initiatives like a school prayer amendment, which I oppose, I would urge my colleagues to devote their energies to rooting out ridiculous barriers that have been erected to forbid voluntary meetings of students who seek to meet and pray in non-disruptive ways.

Let me give you two examples that demonstrate the problems that vibrant, believing students are facing across the country, and I believe abridges their constitutional rights under the first amendment.

At Guilderland High School in New York, Christian students sought and have been denied the right to meet before classes for prayer. The meetings were voluntary, and required no school an-

nouncements or sponsorship. A Federal district court and appeals court have upheld the school board's refusal to allow the group to meet. This is the case of *Brandon v. Guilderland Control School District*, 635 F. 2d 971—so on, with the citation.

The second example is in Lubbock, Tex. The school board drafted a careful policy that accommodated student-initiated religious activity on an equal basis with other student groups in the use of school facilities for meetings before and after school. The U.S. Court of Appeals for the Fifth Circuit struck down this school board policy and forced a total ban on voluntary, student-initiated religious activity. That is *Lubbock Civil Liberties Union v. Lubbock Independent School District*.

Mr. Chairman, it is unduly restrictive actions like these, in Lubbock and Guilderland High School, to which the Congress should devote its attention. By chilling sincere efforts to pray for God's grace and forgiveness in voluntary meetings that do not disrupt the academic functions of a public school, we do far more damage to the Nation's moral fiber than through any Supreme Court decision that invalidates a routine, formalistic, and spiritually bankrupt prayer that the New York Regents drafted in the 1960's.

Because of these concerns, I asked the Christian Legal Society to provide me with a legal memorandum outlining the problems that have developed in restricting the religious freedom which may be enjoyed by students on public campuses. The Christian Legal Society has done some extraordinary work in researching, litigating, and advocating on behalf of religious freedom. I would like to have the committee consider the Christian Legal Society memorandum and recommendations for legislative initiatives as a realistic alternative to the school prayer amendment.

One last word. Mr. Chairman, we have venerated in this country of ours the right of free speech in our public school system by limiting a free exchange of ideas. The mutual exchange of ideas, in the pursuit of truth, is one of the most fundamental instruments of learning. Mr. Chairman, when we begin to put a content restriction on that pursuit of truth and knowledge in our public schools and allow any kind of discussion, except religious, we are doing violence to our constitutional right in the first amendment. That is why I am here this morning, on behalf of the freedom of speech. Once we create that forum, we should maintain content neutrality on the subject matter that is pursued in those educational experiences. Once we establish a forum for student clubs, and student activities that can be organized for political purposes, for social purposes, or any other purpose, but put limits on meetings for religious purposes, we are denying the right of free speech.

So I am saying to you this morning, let us set aside what I believe is the wrong approach, of a constitutional amendment, and pursue through legislative initiative the opportunities open to us to correct these wrong interpretations and these violations by the lower courts of our country. In my view these decisions are doing violence to the freedom of speech guaranteed by the first amendment.

[The following memorandum, submitted by Senator Hatfield, follows:]

MEMORANDUM

June 28, 1982

TO: Samuel E. Ericsson, National Coordinator for Religious
Freedom Services of Christian Legal Society
FROM: Members of the Staff of Christian Legal Society

QUESTION PRESENTED: What is the best legislative means to apply principles of the Widmar v. Vincent decision to the context of public schools?

I. THE PRINCIPLE OF WIDMAR v. VINCENT

In Widmar v. Vincent, 102 S. Ct. 269 (1981), a student group called "Cornerstone" requested access to public facilities on the campus of the University of Missouri, for the purpose of holding religious meetings. Id. at 272. Cornerstone sought access on the same terms that applied to the use of university facilities by more than 100 other student groups. The University denied the request pursuant to a university policy prohibiting religious meetings on campus. Id. The Supreme Court ruled against the University, holding that it could not deny use of its facilities for religious meetings if it allowed similar use by non-religious groups on a general basis. Id. at 278.

In so ruling, the Supreme Court reaffirmed the First Amendment principle that regulation of speech must be "content-neutral." See Heffron v. International Society for Krishna Consciousness, Inc., 101 S. Ct. 2559 (1981). This principle means that a state may not discriminate against a particular type of speech based on the content of the speech, without offering a compelling interest in justification. See Carey v. Brown, 447 U.S. 455 (1980).

The Widmar decision confirms that the principle of "content-neutrality" governs state action in the context of a state university. Widmar holds that once a state university creates an "open forum" for speech--for instance, by allowing student groups to meet freely on campus--it may not discriminate against meetings where the speech has religious content or any other particular content. The Widmar Court left open, however, the question of how the principle of content neutrality will apply to state action in the context of student meetings in public secondary and elementary schools.

II. THE PROBLEM: PUBLIC SCHOOL AUTHORITIES AND LOWER FEDERAL COURTS HAVE REFUSED TO ENFORCE THE WIDMAR CONTENT-NEUTRALITY PRINCIPLE WITH RESPECT TO PUBLIC SECONDARY SCHOOLS

A. The Supreme Court decisions on "prayer in school."

In the context of public schools, the Supreme Court has struck down only forms of prayer and religious activity that are initiated in various ways by the state. Specifically, the Court has ruled unconstitutional state policies that initiated student recitation of the Lord's Prayer in class, Engel v. Vitale, 370 U.S. 421 (1962); reading from the Bible over a school intercom, School District of Abington Township v. Schempp, 374 U.S. 203 (1963); bringing a religious teacher on campus to do class instruction, McCollum v. Board of Education, 333 U.S. 203 (1948); and posting of the Ten Commandments on school walls, Stone v. Graham, 449 U.S. 39 (1980). The Supreme Court thought these practices violated the principle of state neutrality toward religion, because the state initiated the religious activity, the context indicated state sponsorship of the religious activity, and the students could avoid the religious activity. The Supreme Court has never held against religious activity which is purely voluntary, initiated by students, and merely allowed by the school on the same basis as student-initiated non-religious activities.

B. Actions of School Authorities and Lower Courts.

A limited sampling of public schools across the country by the Christian Legal Society has already uncovered the following examples of actions by school authorities which are contrary to the content-neutrality principle of Widmar:

1. In Williamsport, Pennsylvania, a student group applied to the local school board for permission to start a club called "Petros", which planned to hold religious meetings before school, after school, or during a school club period. The school board refused the request, forcing the students to file suit in federal district court to seek protection of their rights of freedom of speech and freedom of assembly.

2. In Anderson, South Carolina a public high school opens its doors one-half hour early each day for peaceable student meetings in vacant rooms. For some time, a group of students has used this opportunity for voluntary meetings to pursue Bible study, prayer,

and worship. Recently, the local representative of the American Civil Liberties Union has publicly threatened to file suit against the local school board to require it to police the content of student speech by banning any meetings with religious content.

3. For several years prior to the 1980-81 school year, students at North Allegheny High School in Pittsburgh, Pennsylvania, had met on school grounds to study the Bible and pray. The meetings occurred during a twenty-five minute period of time after the arrival of school buses and before the beginning of homeroom period. When this practice was brought under question, high school administrators and then the superintendent of the school district denied a formal request made by the students to use a classroom before school hours began.

4. In Dixon, Illinois (the hometown of President Reagan), a local school board has voted to ban all voluntary religious activities of students on school grounds. Also, the same school board will allow outside community groups only four opportunities per year to rent or reserve school facilities for meetings after school hours if these groups intend religious speech; non-religious groups enjoy after-hours access without this restriction.

5. In Brandon v. Guilderland Central School District, 635 F.2d 971 (2d Cir. 1980), cert. denied, 102 S. Ct. 970 (1981), the United States Court of Appeals for the Second Circuit upheld the decision of the Guilderland Board of Education to ban voluntary, student-initiated religious meetings from school property during, before, and after school hours with language implying that no religious activity whatsoever is permissible in public schools. The Second Circuit said that an "adolescent may perceive 'voluntary' school prayer in a different light if he were to see the captain of the school's football team, the student body president, or the leading actress in a dramatic production participating in communal prayer meetings in the 'captive audience' setting of a school." 635 F.2d at 978. This language would logically lead school officials to prevent students from bowing their heads to say a prayer before lunch, carrying their Bible to school, or doing any other overt religious act of free exercise of religion within the boundaries of the school. The Supreme Court declined to review this decision in December, 1981, shortly after deciding Widmar.

6. In Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F.2d 1308 (5th Cir. 1982), the United States Court of Appeals for the Fifth Circuit went even farther than the Second Circuit did in Brandon, by forcing a total ban of voluntary, student-initiated religious activity in a school district that wanted to accommodate the free exercise of religion and freedom of speech rights of public school students. The Fifth Circuit upset a carefully drafted school board policy, adopted after public deliberation, which purported only to treat all student-initiated groups equally with regard to access to school facilities for meetings before and after school.

III. CONGRESSIONAL LEGISLATION TO ADDRESS THE PROBLEM.

The basic question is whether Congress can legislate to apply the Widmar principle of content-neutrality to public schools, without violating the Establishment Clause. The Widmar decision held that a content-neutral policy of equal access to state university facilities did not violate the Establishment Clause, because any religious meetings would be student-initiated and would receive only incidental benefits from the state on the same basis as non-religious meetings, with no appearance of state sponsorship.

In a footnote, however, the Widmar Court carefully reserved the question whether the Establishment Clause prevents application of the content-neutrality principle to protect religious speech at the secondary and primary school levels. 102 S. Ct. at 276 n.14.

A. The Establishment Clause As Applied to Public Schools.

In Widmar v. Vincent, the Supreme Court declined to consider whether an open forum policy in a public elementary or secondary school, allowing students to meet equally in religious and non-religious groups, is neutral toward religion vs. non-religion. The Court suggested, however, that the neutrality of such a policy will turn at least partly on the "impressionability" of students in the public schools. 102 S. Ct. at 276 n.14. In other words, the Court thought that the immaturity of younger students might cause those students to perceive state sponsorship of religion from an open forum policy, even though the same policy would not connote state sponsorship in a university setting.

Therefore, the application of the Establishment Clause to

public schools will turn at least partly on the fact question of whether the students involved are significantly less mature than college students. A further important question will be, given the maturity level of the students, will they be likely to perceive an equal access policy as state favoritism or sponsorship toward religion, or will they be likely to perceive discrimination against meetings with religious content as a form of state hostility toward religion?

B. The Appropriate Role for Congress.

The maturity of public school students and the relationship of maturity to the impression of state sponsorship of religion are factual questions that Congress is well-able to resolve through its investigatory and factfinding powers. Congress is well-suited to exercise its legislative fact-finding capacity to solve the problem at issue here, by investigating relevant facts and deciding at what grade level students are mature enough to choose freely among various types of extracurricular student group activities, both religious and non-religious, without danger of student perception of state sponsorship of religion. For example, Congress might very well decide that secondary school students are mature enough to choose freely among the types of voluntary student activities in which they will participate, while elementary students are not sufficiently mature.

IV. CONGRESS HAS AUTHORITY TO PROVIDE A SOLUTION TO THE PROBLEM

A. Congressional Power Under Section Five of the Fourteenth Amendment.

The Fourteenth Amendment's due process and equal protection clauses incorporate several individual constitutional rights as binding on the states, including the freedom of speech, Fiske v. Kansas, 274 U.S. 380 (1922), and the freedom of assembly, DeJonge v. Oregon, 299 U.S. 353 (1937). Section Five of the Fourteenth Amendment provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Therefore Congress has general authority to enact legislation requiring states to respect constitutional rights of free speech and free association.

The content-neutrality requirement, a fundamental incident

of the right of freedom of speech, also falls within the due process and equal protection obligations imposed on the states by the Fourteenth Amendment. See Widmar v. Vincent, 102 S. Ct. 269 (1981). Therefore, Congress has authority pursuant to Section Five of the Fourteenth Amendment to enforce the content-neutrality principle upon state administered public schools, by appropriate legislation.

Congress should not be deterred from applying Widmar to public schools merely because of the refusal of two circuit courts to do so. See Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F.2d 1308 (5th Cir. 1982); Brandon v. Guilderland Central School District, 635 F.2d 971 (2d Cir. 1980), cert. denied 102 S. Ct. 970 (1981). A recent Congressional Research Service memorandum commenting on Senator Jepsen's proposed Widmar bill concludes that since the Supreme Court has not ruled on this issue, Congress has authority under Section Five to make its own determination and legislate accordingly. Congressional Research Service Memorandum at 12. See Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); Katzenbach v. Morgan, 384 U.S. 641 (1966). But see Oregon v. Mitchell, 440 U.S. 112 (1970). Furthermore, the Lubbock and Brandon decisions are subject to serious question because of their apparent inconsistency with Widmar.

B. Congressional Authority Over The Appropriations of the Federal Government.

A bill applying the Widmar principle to public schools is independently supported by Congressional authority over federal government appropriations. Congress has broad power to attach conditions to its grant-in-aid programs, as long as those conditions are themselves constitutional. See, e.g. Fullilove v. Klutznick, 448 U.S. 448 (1980); Steward Machine Co. v. Davis, 301 U.S. 548 (1937); cf. Harris v. McRae, 448 U.S. 297, reh. den. 448 U.S. 917 (1980).

Again, the absence of any definitive statement by the Supreme Court on whether content-neutrality at the public secondary school level violates the Establishment Clause as applied to religious speech has led the Congressional Research Service to conclude that this "proposed condition cannot at this time be said to impose an unconstitutional condition on federal assistance to such schools."

See Congressional Research Service Memorandum at 6. In sum, Supreme Court silence on the Establishment Clause question in the public secondary school context leaves the Congress free to enact a statute that would apply the Widmar principle of content-neutrality to public schools in a manner consistent with the Establishment Clause according to the view of Congress.

V. WHAT WOULD BE THE RELATIONSHIP OF A BILL EXTENDING THE WIDMAR PRINCIPLE TO PUBLIC SCHOOLS WITH THE PRESIDENT'S PROPOSED PRAYER AMENDMENT?

The President's Prayer Amendment, under its most likely interpretation, would solve the problem addressed by a bill extending Widmar to public schools, that is, the failure of lower courts and school boards to so apply the Widmar free speech principle of content-neutrality.

The President's proposed Prayer Amendment reads as follows:

"Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No persons shall be required by the United States or by any State to participate in prayer."

The proposed amendment would seem to address the failure of lower courts and school officials to allow voluntary, student-initiated religious group meetings on the same basis as non-religious groups as required by the Widmar content-neutrality principle.

The essence of the prayer amendment is to correct the current judicial and public misconception that the First Amendment Establishment Clause bars religion from any influence on public life in general, and public schools in particular. The effect of the amendment's reaffirmation of an earlier understanding would be to allow reinstatement of non-coerced individual and group prayer in all public institutions insofar as the First Amendment has been considered a bar. But it would not require such reinstatement, if states construed such a bar from state laws or constitutions.

As a corollary effect, the prayer amendment would eliminate use of the Establishment Clause as a justification for discrimination against meetings and speech of public school students when religious in nature. Thus, the prayer amendment in part pursues the same objective as would a bill applying the Widmar content-neutrality rule to public secondary schools.

In addition to being compatible with the prayer amendment, a bill applying content-neutrality to public secondary schools enhances the cause of that amendment in several ways. First, Administration and Congressional support of a bill extending the Widmar principle to public secondary schools would demonstrate the resolve of those branches to deal with the loss of voluntary religious activity from public schools. Second, while the President's Amendment will take at least several years to enact, a statute could correct relatively quickly the most recent and perhaps the most extreme of the judicial distortions at which the amendment is aimed. Third, a Widmar bill, within its sphere of impact, could make an affirmative requirement of neutrality, rather than just removing the federal Constitution as the asserted reason for discrimination against religious activity.

Furthermore, a statute extending Widmar to public schools focuses attention on those violations of freedom of speech and association that are most offensive to the overwhelming majority of American people. This has been indicated in informal conversations between Christian Legal Society attorneys and representatives of several groups which normally express reservations about state-sponsored prayer, but which endorse the content-neutrality principle.

Congressional hearings on this bill could easily be consolidated with hearings on the President's Prayer Amendment. They are simply two mutually consistent answers to the same problems. A bill would be only a temporary solution to a part of the problem; thus, it would in no way eliminate the need for an amendment.

VI. PROPOSED LANGUAGE FOR A BILL EXTENDING THE WIDMAR PRINCIPLE TO THE PUBLIC SCHOOLS

Several good proposals have already been offered for such a bill, including proposals by Senator Jepsen, Senator Helms, and the law firm of Ball and Skelly. The only question is which is best. Copies of each proposal are attached to this memorandum for references as appendices.

A. Christian Legal Society Also Has Drafted Language for a Widmar Bill in Public Schools. It Reads As Follows:

"No public secondary school receiving federal financial assistance, which generally allows groups of students to meet during non-instructional periods, shall discriminate against any meeting of students on the basis of the content

of the speech at the meeting, provided that the meeting shall be voluntary and orderly and that no activity which is in and of itself unlawful need be permitted."*

B. Explanation of Terms of Christian Legal Society Proposal.

1. The proposed statute limits the application of Widmar content-neutrality to secondary schools. The statute omits reference to primary schools. This is in recognition that Congress, and perhaps the Supreme Court as well, might consider the danger of perceiving state sponsorship from equal treatment of religious activity too great for primary-age children.

2. The statute applies only against those schools that receive federal financial assistance. This self-limitation should satisfy those who defend the rights of local schools that do not accept federal funds to administer their programs free from federal intervention. Regarding the time period during which a school must have accepted federal funds to come within the requirements of this statute, the statute leaves this matter open as the subject of reasonable and appropriate regulation by proper federal administrative officials, in light of legislative history that should be clearly established after hearings.

3. The statute applies to schools that "generally" allow student meetings. Use of the term "generally" conforms to the decision of the Supreme Court in Widmar v. Vincent, 102 S. Ct. 269, 277 (1981). The significance of the term is that by its use, the statute applies not to schools which have allowed one or two groups to meet on a one-time basis, but to schools that allow many student groups to meet in general. Cf. Congressional Research Service memorandum (arguing that Senator Jepsen's proposal has a weakness in its omission of the term "generally.")

4. Use of the term "groups" of students also comports with the Supreme Court's decision in Widmar. See 102 S. Ct. at 273. The statute by its terms does not require content-neutrality regarding the isolated religious speech of one student absent a listener. (Students are already allowed to pray silently by themselves.)

5. The statute limits application of content-neutrality to "students". Thus, the statute does not address whether faculty,

*An alternative proposal might add the word "religious" before the word "content" in this statute. See infra at 15.

staff, or school administrators may engage in religious group meetings on a public school campus. Again, this limitation comports with Widmar, where the Court expressly limited its holding to students. 102 S. Ct. at 273 n.5.

6. The statute demands that the state must not discriminate against any student "meeting" on the basis of speech. Use of the limiting term "meeting" mirrors the holding in Widmar, which precluded content-based discriminations only against student "meetings". 102 S. Ct. at 273. Of course, the statute incorporates the Widmar Court's implicit teaching that not only may states not discriminate against student meetings on a content basis, but also that the state may not regulate speech occurring in a meeting on a content basis.

7. By use of the term "non-instructional periods", the statute intends to mean any period of time, either before, during, or after the school day, during which the students who wish to meet as a group for religious purposes do not have classes or other scheduled activities. A time period unscheduled for class for several group members constitutes a "non-instructional period" allowing those members to meet for purposes of this statute, even though other members officially part of the group have classes scheduled, and therefore cannot meet at that time.

8. The statute uses the term "discrimination" instead of the word "exclusion" as used in Widmar v. Vincent for several reasons. First, the term "discrimination" better represents the hostility toward religion that a school board shows by denying meeting privileges to student religious groups on an equal basis with non-religious groups. Second, "discrimination" is a broader term than "exclusion". The term "discrimination" includes a prior restraint policy of total refusal of access to meeting facilities as was the case in Widmar, as well as after-the-fact penalties against students who chose to attend a religious meeting, and subtler forms of discrimination against student religious groups falling short of a total exclusion from meeting privileges.

9. "Content of the speech at the meeting" is a broad phrase precluding school officials from discriminating against many forms of speech, including educational, ethical, religious

or vocational speech but not to the exclusion of speech of other subject matter. Any speech "at the meeting" is subject to the content-neutrality requirement against state discrimination, no matter whether the discrimination would occur before the meeting would be held, during the pendency of the meeting, or after the meeting had ended.

10. The statute's requirement that student meetings must be "voluntary" ensures that a public school will neither use student meetings as a means of infringing the free exercise of religion rights or freedom of speech "right to hear" rights of students, nor as a vehicle for state initiated religious or non-religious activity of the sort that would violate the Establishment Clause.

11. The statute requires that student meetings must be "orderly". The term "orderly" is intended to summarize and represent the right and duty of school officials to administer an educational program without material disruption by students, as established in the case of Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969).

12. The statute used the phrase "in and of itself unlawful" to designate those types of speech that are not normally protected forms of speech under the First Amendment, such as criminal speech. A school could prevent students from meeting to discuss illegal narcotics deals.

13. Finally, it is important to note that the proposed language of this statute, in contrast to the language of other similar proposed statutes, does not use the word "religious", or purport to "guarantee the rights of religious speech on the same basis as non-religious speech" for several reasons. First and foremost, a statute drawn in strictly neutral terms should draw the support of a number of groups engaged in many different forms of speech better than would a statute drawn on religious terms. Second, the Fifth Circuit seized upon the religious focus of a school board's equal access policy in Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F.2d 1308 (5th Cir. 1982) to strike down that policy as having an impermissible religious purpose condemned by the Establishment Clause.

On the other hand, there are good reasons for drafting the statute to ban discrimination based on the religious content of speech, rather than banning all content-based discriminations. Banning all content-based discriminations may be undesirable if it precludes school officials from protecting students against influence from witchcraft or other harmful activities and ideas.

Senator DENTON. Thank you very much, Senator Hatfield. If my colleague from Oregon wishes to be excused, we will proceed to hear the statement of the distinguished Senator from North Carolina, Senator Helms.

Good morning, sir.

STATEMENT OF HON. JESSE HELMS, A U.S. SENATOR FROM THE STATE OF NORTH CAROLINA

Senator HELMS. Mr. Chairman, having been a committee chairman for some time and presided over many hearings, I know that the most glorious words that a witness can utter at the outset is: I have a prepared statement, Mr. Chairman, but I will not read it all, and I will ask that it be included in the record.

I do that because, to a very large extent, my review of the school prayer matter closely parallels the historical review that the distinguished chairman of this committee, Mr. Thurmond, gave at the outset of the hearing.

But I do thank you and the other members of the committee for the privilege of coming here this morning to testify concerning the President's school prayer constitutional amendment.

I think we ought to examine at the outset what this amendment does and what it does not do. It does not impose prayer on anyone. It does not force any child to participate or even listen to a prayer. What it does do is to restore the situation that existed before the extremely unfortunate and unwise decision of the Supreme Court—and there was more than one decision, as the Chair knows—which confused and bewildered the people of this country.

Now, if I may, Mr. Chairman, and with all due respect, comment briefly on some of the observations by the distinguished Senator from Ohio, Mr. Metzenbaum. Now, Senator Metzenbaum is entitled to view things as he wishes. I respect him, though frequently I disagree with him. But his flat challenge, his accusation that those who are trying to seek redress are, quote, eroding the Constitution, end of quote—Senator Metzenbaum is wrong. It was not the Moral Majority or the U.S. Senate or President Reagan who eroded the Constitution in this manner; it was the Supreme Court of the United States. And the Congress of the United States has not only the right but the duty, in the judgment of this Senator, to correct such a grievous error.

Now, Senator Metzenbaum said that he didn't believe in all of these constitutional amendments. Well, he believed in the equal rights amendment; he had no objection to the adoption of that.

As for his comments about efforts to limit the jurisdiction of the Federal courts, I hope that the distinguished Senator from Ohio—

and I wish he were here to hear my remarks—I would hope that he would read the Constitution with respect to the right and duty of the Congress in limiting the jurisdiction of the Federal courts.

And then he said, if I heard him correctly, it is very difficult to speak out for the Bill of Rights. Now, at best, I would say to my friend from Ohio, that is a self-serving declaration, but I will say to him in response, that is precisely what we are doing here this morning.

One further word, and I will yield my time, Mr. Chairman.

I have been dismayed by the conduct of the major news media of this country with respect to this issue and some others. And let me give you an illustration.

In October of 1980 I was in Dallas for a meeting, and after the evening meeting I went to the hotel at which I was staying, and, having had no dinner, I went into the coffee shop for a sandwich. Up came a fine-looking young man whom I did not know, introduced himself as Bill Murray, and asked if I was spending the night in Dallas, and I told him I was. Frankly, Mr. Chairman, I thought that he might be the son of the former athletic director of Duke University, Bill Murray. But it turns out that this Bill Murray is the son of Madeline Murray O'Hare. I did not know what to expect, because I did not connect Mr. Murray, and I frankly had not heard of his efforts in connection with restoring prayer in the schools. But I invited him nonetheless to join me in having a sandwich.

During that conversation—and I suppose it consumed the better part of an hour—Mr. Murray told me of the details of how Marxists and out-and-out communists assisted his mother in the lawsuit that led to this Supreme Court decision. He identified by name some of the people who came to his mother's home. And it occurred to me that this was something that the major news media had inadvertently missed.

So not long ago I appeared on a nationwide television program, and during that appearance I suggested to the moderator of the program that that television network might well invite Mr. Murray to come and tell that side of the story. The network has not done it, because, as Mr. Murray himself told me that October evening in Dallas, the minute he begins to discuss the details of how his mother's lawsuit was implemented, down comes the curtain, Mr. Chairman, off go the cameras, and not a mumbling word is said about it.

So I would challenge the news media of this country, and I would remind my friends on the committee that I come from the news media myself—I would challenge them to at least let Mr. Murray be heard, because he is today a dedicated Christian and he is trying to go around this country to apologize for his having been used in a lawsuit that led to one of the most disastrous decisions of the Supreme Court in my memory.

That's about it, Mr. Chairman. I will consume no more of the committee's time.

Senator DENTON. Thank you and good morning to you, Senator Helms.

[The prepared statement and submissions of Senator Helms follow:]

PREPARED STATEMENT OF SENATOR JESSE HELMS

Mr. Chairman, I thank the Chair for giving me the opportunity to testify concerning the President's school prayer constitutional amendment. Restoring the traditional American practice of voluntary prayer in the public schools has been a matter of high priority with me for the last decade. In the 97th Congress we now have excellent opportunities--perhaps better than at any time since the early 1960's--to make substantive progress in reestablishing and reaffirming the freedom of the American people to engage in prayer in public institutions. I therefore applaud the President and this Committee for taking time to consider the prayer issue.

Traditional Prayer in Schools

Until the early 1960's there was an old and honorable American tradition of praying in the public schools. For example, prayer had long been the practice in the North Carolina schools. The custom in North Carolina was similar to the practice of voluntary prayer in other parts of the country.

Supreme Court's Changing of the First Amendment

The predicate was laid for the Supreme Court rulings of the 1960's in the 1947 case of Everson v. Board of Education, 330 U.S. 1. In that case the Supreme Court, speaking through Justice Black, interpreted the Establishment Clause of the First Amendment as a restriction on the states for the first time. Although the Everson decision upheld state reimbursement of transportation expenses of children in public and private schools, Justice Black advanced an entirely new theory of the Establishment Clause. Breaking with the original meaning of the Establishment Clause as a restriction exclusively on Congress, Justice Black boldly asserted, "The First Amendment, as made applicable to the states by the Fourteenth, commands that a state

'shall make no law respecting an establishment of religion

. . . "

The two landmark cases which followed the reasoning of Everson and revolutionized the practice of prayer in the schools were Engel v. Vitale, 370 U.S. 421 (1962), and Abington School District v. Schempp, 374 U.S. 203 (1963). In Engel the Supreme Court again applied the Establishment Clause against the states and struck down a requirement of the New York State Board of Regents that each class begin the school day with this simple prayer: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our Country." In the Schempp case the Court invalidated a Pennsylvania statute requiring the reading of 10 verses from the Bible and the recitation of the Lord's Prayer at the beginning of each school day.

Despite the fact that in both Engel and Schempp objecting parents could have removed their children from the group prayers, the Court said that these customary practices violated the First Amendment as incorporated against the states by the Fourteenth.

Mr. Chairman, I submit that the contemporary construction of the Establishment Clause by the Supreme Court in these cases and by the lower courts in countless other cases is a view fundamentally opposed to the true purpose of the First Amendment. Furthermore, nothing in the Fourteenth Amendment was intended to apply the Establishment Clause against the states.

History and Purpose of the First Amendment

There were two glaring errors in Justice Black's reasoning in the Everson case which have caused much subsequent mischief. First, Justice Black wrongly asserted that the First Amendment was intended to erect a "wall of separation" between church and state. Second, he said that the First Amendment grew out of

"feelings of indignation" by the populace against state-maintained churches. Both of these arguments represent an historical sleight of hand.

In his famous Commentaries on the Constitution Supreme Court Justice Joseph Story counters both when he says, "[T]he real object of the [First] Amendment was not to countenance, much less to advance Mohametanism, or Judaism, or infidelity, by prostrating Christianity, but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which would give to an hierarchy the exclusive patronage of the national government." Joseph Story III, Commentaries on the Constitution section 1871 (1833).

With the idea of a "wall of separation" Justice Black implies that the First Amendment bans religion from the public life of the Nation. This has never been the case. From the earliest days of the American Republic Congress has begun its sessions with a prayer. It has further traditionally had a formal office of Chaplain. Courts themselves customarily open their sessions with the announcement "God save this State and this honorable Court." On our currency is the statement "In God We Trust." No one has ever seriously contended that these customs, deeply embedded in our heritage, constitute a forbidden establishment of religion. Again, they all point to the fact that the Establishment Clause was intended simply to prevent the establishment of a national church.

In George Washington's Farewell Address, he gave the following counsel: "Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism who should labor to subvert these great pillars of human happiness."

Washington's view has indeed been the mainstream of the

legal and social attitude of the American people and the drafters of the Constitution in regard to the religious rights preserved in the Bill of Rights. Professor Edwin S. Corwin, one of our most distinguished constitutional scholars, rejected any interpretation of the First Amendment which would force upon government institutions the formal agnosticism which results from the "wall of separation" theory. Professor Corwin writes:

The historical record shows beyond peradventure that the core idea of an "establishment or religion" comprises the idea of preference; and that any act of public authority favorable to religion in general cannot, without manifest falsification of history, be brought under the ban of that phrase.

As to the other argument that the First Amendment expresses indignation against the established churches which existed in the states early in the Republic, history again is to the contrary. The drafters of the First Amendment very carefully sought to leave the states free in the area of church-state relations. The Amendment states: "Congress shall make no law respecting an establishment of religion . . ." It says nothing about the states, and it is a proscription only on that branch of the Federal government holding the power to establish a national church--that is, Congress.

In a recent article on the origin and purpose of the Establishment Clause, Dr. James McClellan, the constitutional scholar who has written the definitive book on Justice Story's career and who now serves as Chief Counsel for the Senate Separation of Powers Subcommittee, observes:

Directed solely against Congress, the Establishment Clause gave the states, by implication, full authority to determine church-state relations within their respective jurisdictions. Thus the Establishment Clause actually had a dual purpose: to guarantee to each individual that Congress would not impose a national religion, and to each state that it was free to define the meaning of religious establishment under its own state constitution

and laws. The federal government, in other words, simply had no authority over the states respecting the matter of church-state relations. To be sure, one of the principal reasons for the adoption of the entire Bill of Rights . . . was to deny the federal government a commanding voice in the general area of civil liberties, except as stipulated in the Constitution itself. The power to define civil liberties within the several states, including the power to decide what practices were acceptable under the general heading of church-state relations, was, in the true sense of that much abused term, the state's right, as determined by state constitutions and state bills of rights.

James McClellan, "The Making and Unmaking of the Establishment Clause," in Patrick B. McGuigan and Randall R. Rader (eds.) A Blueprint for Judicial Reform at 295 (Free Congress Research and Education Foundation, Inc. 1981).

Hence, if anything is clear about the First Amendment, it is that that provision was intended to prevent the Federal Government from interfering with the states in matters involving church-state relations. This intention is confirmed beyond argument by the fact that from the late eighteenth century to the middle nineteenth century there were various degrees of established churches. And there were various religious qualifications for holding state office. The first constitution of the state of South Carolina even stipulated that the Protestant religion was the established religion of the state. No court during this time or at any time prior to the Second World War even entertained the idea that these practices were prohibited by the First Amendment. On the contrary, it was the First Amendment which by its very terms prohibited Federal government involvement in religious matters and left them entirely to the governance of the states.

The Distortion of the Establishment Clause by the Theory of Fourteenth Amendment Incorporation

The threshold issue presented in the Engel and Schempp cases was whether the Establishment Clause of the First Amendment

applied to the action of state governments through the Fourteenth Amendment. The Supreme Court rejected an historical analysis of the meaning of the Fourteenth Amendment and relied on unsupported assertions. "First," wrote Justice Clark, "this Court decisively settled (that the Establishment Clause) has been made wholly applicable to the states by the Fourteenth Amendment." For proof, he cited an opinion of Justice Roberts in Cantwell v. Connecticut, 310 U.S. 296 (1940). The difficulty here is that the Cantwell case did not deal with the Establishment Clause and therefore did not settle anything at all. Thus the fundamental issue before the Court was disposed of by hypothesis.

Here again, an open historical inquiry would have led to a result far different than that reached by the Court. The framers of the Fourteenth Amendment themselves did not intend, nor did they believe, that the amendment would prohibit the states from encouraging prayer in public schools. How else can one understand Senator James Blaine's proposed Constitutional Amendment in 1877 that the Establishment Clause be applied to the states? The Blaine amendment, which failed, would have produced the result that the Supreme Court reached in the Engel and Schempp cases. If the Fourteenth Amendment was intended to achieve the Engel-Schempp result, why would those who had just adopted it propose to do it again?

The answer is that the Fourteenth Amendment was never intended to apply the Establishment Clause of the First Amendment to the states. Only a distortion of both amendments and their history permits such an application.

Remedies for the Supreme Court's Impairment of the Establishment Clause

Consistent with the theory of checks and balances, Congress is not without power to correct judicial distortions of the

Constitution. There are at least five means available to Congress: the appointment process, constitutional amendments, congressional enforcement powers, impeachment, and Article III legislation withdrawing jurisdiction from the Federal courts.

It is my position that Congress should pursue--indeed that Congress has a duty to pursue--all available constitutional remedies to restore the integrity of the Constitution in those areas where it has been distorted by the courts. To this end I intend to continue to push my Voluntary School Prayer bill, S. 1742, at the same time I support the President's proposed constitutional amendment. Despite the amazing and shrill outcry in the media against withdrawal of jurisdiction, this power has specifically been conferred on Congress in Article III, sections 1 and 2. My bill employs this power to ameliorate constitutional distortions made by the federal courts in the area of school prayer.

Suggestions Concerning S. J. Res. 199

Finally, let me say that while I am delighted to be a cosponsor of the President's proposal to restore voluntary school prayer by way of a constitutional amendment, there is one aspect of it which gives me some pause. The purpose and spirit of the Establishment Clause was to assure that the federal government had no role in setting policies governing church-state relations. The states in this area were to be free from interference by the Federal government. This principle has been severely distorted by the Supreme Court, and any amendment to correct ~~that~~ such distortions should return to the original principle. I'm afraid that some of the language of S.J. Res. 199, especially the second sentence, may actually confer on the Federal government certain authority in church-state relations which, but for erroneous Court rulings, the Federal government has never had. Therefore I encourage the Committee to modify such language so as to assure

that the states retain their traditional plenary authority in church-state relations.

In order that the Committee may fully review the history of the Establishment Clause, I ask that Dr. McClellan's article previously mentioned in my testimony be included in the Record. I have a copy for the Clerk. Thank you.

A Blueprint for Judicial Reform

Edited By
Patrick B. McGuigan
Randall R. Rader

THE FREE CONGRESS RESEARCH AND EDUCATION FOUNDATION

Officers and Board

Kathleen Teague, Chairman
Dr. Charles Moser, Secretary-Treasurer
Dr. Robert J. Billings
Dr. Onalee McGraw
Senator William L. Armstrong

Foundation Staff

Paul M. Weyrich, President
Connaught C. Marshner, Director, Family Policy Division;
Editor, Family Protection Report
Dr. Stuart Rothenberg, Director, Political Division;
Editor, Political Report
Patrick B. McGuigan, Editor, Initiative and Referendum Report
Eric Licht, Vice-President for Operations
Robert Billings, Vice-President for Development
Assistants: Elia Dal Bello, Wanda Woods, Claudia Keiper

Judicial Reform Project Staff

Patrick B. McGuigan, Director
Randall R. Rader, Consultant
James S. Denniston, Assistant Director
Claudia Keiper, Legal Research Assistant
Elia Dal Bello, Secretary

A Blueprint for Judicial Reform edited by Patrick B. McGuigan and
Randall R. Rader

Copyright 1981 by the Free Congress Research and Education Foundation, Inc.
721 Second Street, N.E.
Washington, D.C. 20002
202-546-3004

Library of Congress Catalog Card No.: 81-70375

First Printing

Price: \$7.95 (paperback); \$10.95 (hardcover)

Cover Design by Barnett Danner

THE MAKING AND THE UNMAKING OF THE ESTABLISHMENT CLAUSE

James McClellan

The disestablishment of the Anglican Church in Virginia, which Thomas Jefferson accomplished in 1786 with the help of James Madison, is commonly thought to have prepared the way for the adoption of the First Amendment to the Constitution of 1791, declaring that "Congress shall make no law respecting the Establishment of a Religion."¹ As Justice Joseph Story later observed in his famed *Commentaries on the Constitution*, "the real object of the [First] Amendment was not to countenance, much less to advance Mohametanism, or Judaism, or infidelity, by prostrating Christianity, but to exclude all rivalry among *Christian* sects, and to prevent any *national* ecclesiastical establishment which would give to an hierarchy the exclusive patronage of the *national* government."² Directed solely against Congress, the establishment clause gave the states, by implication, full authority to determine church-state relations within their respective jurisdictions. Thus the establishment clause actually had a dual purpose: to guarantee to each *individual* that Congress would not impose a national religion, and to each *state* that it was free to define the meaning of religious establishment under its own state constitution and laws. The federal government, in other words, simply had no authority over the states respecting the matter of church-state relations. To be sure, one of the principal reasons for the adoption of the entire Bill of Rights, as we shall see, was to deny the federal government a commanding voice in the general area of civil liberties, except as stipulated in the Constitution itself.³ The power to define civil liberties within the several states, including the power to decide what practices were acceptable under the general heading of church-state relations, was, in the true sense of that much abused term, the state's right, as determined by state constitutions and state bills of rights.

Such is where matters stood until 1947, when the Supreme Court endeavored for the first time to expound upon the meaning of the establishment clause in the landmark case of *Everson v. Board of Education* (1947).⁴ Pursuant to a state law, the

township of Ewing, New Jersey authorized the reimbursement to parents of money expended for the transportation of their children to and from public and parochial schools. A taxpayer challenged the validity of the law on the grounds that it violated the due process clause of the Fourteenth Amendment, and also constituted an unconstitutional "establishment of religion." Speaking for a sharply divided Court, Mr. Justice Black announced that: "The First Amendment, as made applicable to the states by the fourteenth . . . commands that a *state* 'shall make no law respecting an establishment of religion.' " This was the first instance in which the Court interpreted the establishment clause as a restriction on the states. It was a bold and revolutionary step, overturning more than a century and a half of established precedent that had uniformly permitted the States to set public policy regarding their relations with religious organizations. No less novel was the Court's newfangled theory of the establishment clause and its formal adoption of Thomas Jefferson's "Wall of Separation" doctrine. The First Amendment, said Black, "erected a wall of separation between church and state," prohibiting the federal and state governments from giving aid of any kind not only to particular religious sects, but to all religions in general. "Neither a state nor the federal government," contended Justice Black, "can set up a church. Neither can pass laws which aid one religion, *aid all religions*, or prefer one religion over another . . . No tax in *any* amount, large or small, can be levied to support *any* religious activities or institutions. . . ."

This absolutist pronouncement by Justice Black, it must be emphasized, has become the foundation stone for the modern Court's interpretation of the establishment clause. Whether the issue has been Bible-reading, prayer in the public schools, or tuition grants for parochial school children, Black's oft-quoted dictum is sure to be found at the heart of the Court's opinion. But in *Everson* the Court softened the impact of its new view of the establishment clause by upholding the law in question as a welfare measure assisting children rather than religion. Thus the real significance of *Everson* lies not in the Court's ruling, but in its adoption of an absolutist theory of church-state relations. Both the majority and dissenting members of the Court were unanimously agreed that the establishment clause should be interpreted as an absolute restriction on governmental aid to religion. "In the words of Jefferson," concluded the Court, "the clause against the establishment of religion by law was intended to erect 'a wall of separation between church and state.' "

The judicial history of the establishment clause since 1947 has

been little more than a replay of *Everson*, each justice endeavoring to apply Black's dictum to the factual situation under review, while at the same time attempting to refine it as a workable test for determining the limits of state involvement in the religious affairs of the community. In *McCormack v. Champaign Board of Education* (1948),⁸ the Court invalidated a "released time" program in an Illinois school district which allowed children to receive religious instruction in the public schools. The program provided that pupils whose parents had signed a "request card" were excused from their classrooms to attend religious lectures given without pay by Protestant, Catholic, and Jewish teachers, but within the school building and during the regular class day. Pupils not participating in the program were required to continue their secular studies in other classrooms. Speaking again through Mr. Justice Black, a divided Court held that this program of religious education violated the establishment clause, as applied to the states by the due process clause of the Fourteenth Amendment. Following the dictum laid down in *Everson* that the First Amendment erected an absolute wall of separation between church and state, the Court ruled that the program was unconstitutional because it utilized a "tax-established and tax-supported school system to aid religious groups to spread their faith."⁹

The case of *Engel v. Vitale*,¹⁰ decided in 1962, involved a local school district in New York which under state law had directed the principal of a public school to cause a prayer to be said aloud by each class at the commencement of the school day. Students who did not wish to participate were permitted to remain silent or to leave the classroom. Seemingly innocuous on its face, the non-denominational prayer, composed and recommended by the State Board of Regents, read simply: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country." In a brief opinion, again written by Black, the Court invalidated the authorizing statute as a violation of the First and Fourteenth Amendments. Clearly, argued the Court, the recitation of a prayer was a religious activity. There was no doubt in Justice Black's mind that "in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by government."¹¹

Citing these decisions and a mixed variety of other legal and historical precedents, the Court arrived at a conclusion similar to that reached in the Prayer decision when it decided in 1963

- that Pennsylvania and Maryland had breached the "wall of separation" between church and state by requiring public schools to begin each day with readings from the Bible. Despite the fact various Protestant, Catholic and Jewish versions of the Holy Scriptures were used, without prefatory statements, questions, or explanations, and non-participants were allowed to absent themselves from the classroom, Mr. Justice Clark found for the Court that the practice of governmental sponsored Bible-reading was not permissible under the Constitution. As applied to the states, the First Amendment, Clark declared, requires "that the Government maintain strict neutrality, neither aiding nor opposing religion."¹²

Board of Education v. Allen (1968), the last case of major importance on church-state relations in the Warren Court, represented a return to the "child benefit" theory of *Everson*. In sustaining a state statute authorizing the loaning of secular textbooks to all public and parochial students under New York's education law, the Court, speaking this time through Justice White, reasoned that "[t]he law merely makes available to all children the benefits of a general program to lend schoolbooks free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the state. Thus, no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools."¹³ Citing *Everson* and *Schempp*, White announced that the test of constitutionality was whether the statute in question had "a secular legislative purpose and a primary effect that neither advances nor inhibits religion."¹⁴ He acknowledged that "[t]his test is not easy to apply,"¹⁵ but concluded that under these standards the statute in question was no different from that which the Court found acceptable in *Everson*.

Since 1969, when Warren Burger succeeded Earl Warren as Chief Justice, the Court has endeavored to follow the difficult course laid out in *Everson*, steering between the Scylla of Black's absolutist theory and the Charibdis of his actual holding in *Everson*. From the standpoint of uniformity, the decisions have not been entirely satisfactory, and the Court seems to have made little progress in resolving what Chief Justice Burger has accurately described as the "internal inconsistency in the opinions of the Court . . ."¹⁶ Certainly it is difficult to disagree with Justice Powell's contention that the Court's decisions, viewed as a whole, lack a coherent rationale. The cases, for example, reflect the questionable assumption that government aid to church-related colleges is less obtrusive than government aid to

primary and secondary schools, where the students are supposedly more susceptible to religious indoctrination.¹⁷ It is not entirely clear why government funding of bus transportation to and from parochial schools is acceptable under the establishment clause, but public funding of transportation for field trips is not;¹⁸ nor is there a sharp analytical distinction between state aid in the form of textbooks, which is not prohibited, and state aid in the form of other instructional materials, such as maps, which is prohibited.¹⁹ In terms of aid to religion, it would also seem that a tax exemption to a house of worship has a more direct effect than a tax credit to the parent of a child enrolled in a church-affiliated school.²⁰ These distinctions without a difference, suggests Powell, may be justified on the grounds that the Court has wisely sacrificed logical consistency in order "to establish principles that preserve the cherished safeguard of the Establishment Clause" while at the same time encouraging "the positive contributions of sectarian schools. . . ."²¹

The balancing of these diverse interests is surely a delicate task that has produced much disagreement and doctrinal confusion in the Court. In reality, the Court seems to have worked itself into a corner, straining on the one hand to maintain Black's absolutism, while on the other to accommodate deeply rooted habits and practices that actually breach the wall of separation. Comparing the decisions of the present Court with those of the Vinson-Warren era, it is nevertheless reasonable to say that "[b]oth the absolutism of Mr. Justice Black and his particular conceptions of religion's relation to government seem, on the whole, to wane in influence as the Burger Court takes shape."²² Although this modest departure has not been applauded by all the members of the Court, there is no denying that "the heritage of Mr. Justice Black appears presently to receive a somewhat skeptical attention. The present Court expressly abjures 'absolutism'; it 'balances' or 'accommodates' the First Amendment provisions which Mr. Justice Black regarded as unqualified."²³ Whether this trend will continue, and the ultimate fate of Justice Black's absolutism, are questions that cannot now be answered. But this much seems obvious: The number of ways in which public funds can be channeled into the private sector for the benefit of nonpublic education is not infinite. There are some schemes which have yet to be examined by the Court, such as the experimental voucher system, but on the whole it may be that we have already reached the limits of possible funding alternatives. If this is so, then we can expect fewer decisions under the establishment clause and a greater likelihood that the theory

of church-state relations adopted by the Court, despite its internal contradictions, will become a more permanent fixture of the American constitutional system.

To a generation of Americans raised under the common assumption that it is only natural and fitting that the Supreme Court should determine state policies and practices respecting church-state relations, these cases handed down over the past thirty-four years are seldom viewed as unconstitutional usurpations of state authority. When examined in the light of the historical setting of the Bill of Rights and state religious practices before 1947, however, the *Everson* line of cases can be seen as one of the most radical innovations in American constitutional law since 1787. This article maintains that *Everson* and the entire body of case law built upon it, including the Prayer and Bible-reading decisions, represent an unhistorical view of church-state relations in the early Republic, and are actually contrary to the expressed intent of the Framers and the very purpose of the establishment clause at the time of its adoption. Moreover, it is contended here that the Fourteenth Amendment, which serves as the constitutional vehicle for the application of the establishment clause to the states, was not intended by those who participated in its framing and adoption to alter the scope or original meaning of the establishment clause.

CHURCH-STATE RELATIONS IN THE EARLY REPUBLIC

Although all of the American colonies in the revolutionary period were eager to loosen the existing bonds of religious establishment, each pursued an independent course in reaching this objective. At the outbreak of the Revolution, there were varying forms of established churches in nine of the colonies. In the Southern colonies of Maryland, Virginia, North Carolina, South Carolina and Georgia, the established religion was Anglicanism. In New England, Congregationalism was, in effect, the established church in three colonies — Massachusetts, New Hampshire, and Connecticut. New York had a unique arrangement allowing for the establishment of the Protestant religion.²⁴ But in all of these nine colonies, the established churches were linked politically with the colonial governments rather than the mother country, so that when the colonies became independent states the connection between church and state remained in force. Hence the Revolution itself did not alter the system of church-state relations; what it did was to set in motion the forces of dis-

establishment that ultimately prevailed throughout most of the American colonies.²⁵

Religious Disestablishment in New England. Led by Isaac Backus, the Baptists agitated for disestablishment in New England throughout the revolutionary period. But their memorials and petitions failed to dislodge the Congregationalists, who enjoyed widespread support among a majority of the population, and church-state relations in New England remained essentially the same.

Rhode Island and Connecticut became states in the new confederation under their old charters, and no changes were made regarding the civic relations of the church. Rhode Island remained committed by its charter of 1663 to the principle of separation of church and state, guaranteeing its subjects "the free exercise and enjoyment of all their civil and religious rights." As long as they did not "disturb the civil peace" or abuse their religious liberty to promote "lycentiousnesse and profanenesse," citizens of the state were free to state their "differences of opinion in matters of religion." Such a broad scope of religious liberty was actually an aid to the Christian religion, implied the framers of the charter, because it placed the citizens "in the better capacity to defend themselves, in their just rights and liberties against all the enemies of the Christian faith."²⁶

In Connecticut, the establishment of the Congregational Church was retained, but other Protestant sects were allowed to practice their faith. In 1778, Congregationalists who had separated from the mother church were exempted from taxes for its support; and in 1784 an act was passed stating that no person professing the *Christian* religion would be required to pay taxes for the established church, or penalized for not attending worship there, providing he continued to attend and helped to maintain worship at his own church. Those who did not belong to any religious society were to be taxed for the support of the established church, and *Protestant* dissenters were allowed by law to maintain their own societies. Entitled an "Act for Securing The Rights of Conscience," this statute specified that citizens of Connecticut were expected "on the Lord's day carefully to apply themselves to the duties of religion and piety." Persons failing to "attend the public worship of God on the Lord's day in some congregation allowed by law" were to be fined three shillings "unless hindered by sickness or otherwise prevented" from attending church.²⁷

The state constitution of New Hampshire, adopted in 1776, contained no provisions concerning religious matters; but in

1784, a new constitution, prefaced by a bill of rights, was adopted where it was declared that every citizen "has a natural and unalienable right to worship God according to the dictates of his own conscience." Under the provisions of this constitution, however, the old colonial law which in effect gave to the Congregational churches the status of a town institution, remained in force. Each town was authorized to elect its own minister; and to promote "morality and piety," the state legislature was empowered to authorize "the several towns, parishes, bodies politic, or religious societies. . . to make adequate provision, at their own expense, for the support and maintenance of public *Protestant* teachers of piety, religion, and morality, with the understanding that "no person of any one particular religious sect" would be "compelled to pay towards the support of the teacher of another persuasion."²⁸ The constitution further stipulated that all members of the state legislature "shall be of the *Protestant* religion."²⁹

The arrangement in Massachusetts, determined by the constitution of 1780, was strikingly similar to that of New Hampshire. Indeed, the Massachusetts constitution had served as a model for the architects of the New Hampshire constitution. Massachusetts retained its colonial practice of giving the Congregational church a civil status, allowing every taxpayer to indicate his preference as to which church should receive his support. Those who failed to state their choice were required to pay taxes for the support of the Congregational Church. According to the constitution, each town in the state was authorized "to make suitable provision," at its own expense, "for the institution of the public worship of God, and for the support and maintenance of public Protestant teachers of piety, religion and morality."³⁰ All public officials were required to take an oath that they "believe in the *Christian* religion and have a firm persuasion of its truth."³¹

Standing between the liberality of the Rhode Island charter and the more restrictive fundamental law of New Hampshire, Connecticut, and Massachusetts, the Vermont constitution of 1777 meekly urged "every sect or denomination. . . to observe the Sabbath," while declaring that "no man ought, or of a right can be compelled to attend any religious worship, or erect, or support any place of worship, or maintain any minister, contrary to the dictates of his own conscience." At the same time, the constitution specified that no man professing the *Protestant* religion should be deprived of his civil rights "on account of his religious sentiment, or peculiar mode of religious worship,"³² In

addition, every member of the state house of representatives was required to meet a religious test for office by swearing: "I do believe in one God, the creator and governor of the universe, the rewarder of the good and the punisher of the wicked; and I do acknowledge the scriptures of the Old and New Testaments to be given by divine inspiration, and own and profess the Protestant religion."³³ All of these provisions were carried over into the revised constitution of 1786. Moreover, a law enacted by the state legislature in 1783 allowed for support of the Congregational Church in the townships through local taxation.³⁴

Religious Disestablishment in the Middle-Atlantic States. Turning southward, a similar pattern of discrimination against Dissenters and non-Protestants is encountered. The New York constitution of 1777, supplemented by an act of 1784, abrogated all laws establishing or maintaining "any particular denomination of Christians or their ministers," and all laws "which do grant certain emoluments and privileges to the Episcopal Church." The constitution also declared that "the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed." Making an about-face, the constitution also demanded, however, that all persons naturalized by the state be required to take an oath abjuring their foreign allegiances and subjection in all matters, "ecclesiastical as well as civil."³⁵ (This provision, as Judge Story later pointed out, "was doubtless intended to exclude all Catholics, who acknowledged the spiritual supremacy of the Pope, from the benefits of naturalization.")³⁶

In New Jersey, the constitution of 1776 guaranteed each person "the inestimable privilege of worshipping God according to the dictates of his own conscience," but at the same time imposed a religious test for office, limiting eligibility for the state legislature to "persons professing a belief in the faith of any *Protestant* sect."³⁷ Similarly, the Delaware constitution of 1776, while declaring that "[t]here shall be no establishment of any one religious sect in this state in preference to another," required all persons holding public office to declare by oath their faith in the doctrine of the Trinity and in the divine inspiration of the Old and New Testaments.³⁸

Pennsylvania, which in the colonial period had limited inhabitancy to believers in God and had denied both the franchise and public office to Catholics and disbelievers in the doctrine of the Trinity, "entered the revolutionary period with a restrictive legislation unsurpassed by that of any other" state. In "so far as terms of law made definitions, there was less liberty in Pennsylvania

than in theocratic Massachusetts and conforming Virginia."³⁹ These restrictions were removed in part by the constitution of 1776, which declared that "all men have a natural and iralienable right to worship God, according to the dictates of their own consciences." In addition, the constitution forbade government to support religion through public taxation and "to interfere with, or in any manner control, the right of conscience in the free exercise of religious worship." Nevertheless, civil rights were confined to persons "who acknowledge the being of a God,"⁴⁰ and officeholders were required to affirm by oath their belief in God and in the divine inspiration of the Old and New Testaments.⁴¹

Religious Disestablishment in the South. Nor was a total separation of church and state sought in the Southern colonies during the revolutionary period, except in Virginia. In Maryland, for example, the constitution adopted in 1776 authorized the state legislature to lay a general tax for the support of the *Christian* religion.⁴² The North Carolina constitution of 1776 established a religious qualification for office, declaring that no person could hold a place of public trust if he denied "the truth of the *Protestant* religion, or the divine authority of either the Old or New Testament."⁴³ The South Carolina constitution of 1778 flatly stated that "The *Christian Protestant* religion shall be deemed . . . the established religion of the State." Accordingly, no religious society was entitled to incorporation as a church of the state unless its members agreed "that there is one Eternal God and a future state of reward and punishment; that God is publicly to be worshipped; that the *Christian* religion is the true religion; that the Holy Scriptures of the Old and New Testaments are of divine inspiration and . . . that it is lawful and the duty of every man . . . to bear witness to the truth." Moreover, pastors were required to declare that they would instruct their congregations in the lessons of Scripture.⁴⁴ Finally, in Georgia, the constitution adopted in 1777 disestablished the Anglican Church, but at the same time allowed for the public support of religion through taxation. "All persons whatever shall have the free exercise of their religion," it was asserted in Article LVI, and they "shall not, *unless by consent*, support any teacher or teachers except those of their own profession."⁴⁵ This meant that Georgians could be taxed for the support of their own religion. Accordingly, a law was passed in 1785 stipulating that all Christian sects would receive tax support in proportion to the amount of property owned by their members.⁴⁶ The constitution of 1777 further required that "all members of the legislature shall be of the *Protestant* religion."⁴⁷

Among the Southern states, only in Virginia, it seems, was a complete separation of church and state accepted in principle. But only grudgingly did Virginians advance to this state of mind. At the convention of 1776, Episcopalians and Methodists petitioned unsuccessfully against disestablishment, and the Church of England was severed from the civil authority. A bill of rights was drafted by George Mason, but the section on religion suggested by Patrick Henry was worded in such a way as to imply that there would be no guarantee of complete religious freedom in the Old Dominion. Henry's proposal stated "that all men should enjoy the fullest toleration in the exercise of religion according to the dictates of conscience, unpunished and unrestrained by the magistrate, unless under color of religion any man disturb the peace, the happiness, or safety of society." James Madison insisted that the word *toleration* contained a "dangerous implication," as did the reference to a magistrate. "Toleration," he argued, "belonged to a system where [there] was an established church, and where a certain liberty of worship was granted, not of right, but of grace; while the interposition of the magistrate might annul the grant." The convention agreed, and the objectionable clause was rejected in favor of Madison's amendment, which read: "all men are equally entitled to the full and free exercise of religion, according to the dictates of conscience." Madison was also successful in gaining acceptance of a restraining clause, which declared that "[n]o man, or class of men, ought on account of religion to be invested with peculiar emoluments of privileges, nor subjected to any penalties or disabilities, unless under color of religion the preservation of equal liberty and the existence of the State are manifestly endangered." Thus committed to a broad and revolutionary concept of religious liberty, the Virginia bill of rights stood out conspicuously with the Rhode Island charter against the prevailing mood of quasi-establishment in other states.⁴⁸

The task of implementing these principles now fell to the Virginia legislature. Although disestablished, the Church of England still enjoyed certain advantages over other religious sects. Only the Anglican clergy, for example, could marry without a special license. Meeting soon after the convention, the legislature proceeded under the leadership of Thomas Jefferson to remove the last pillars of religious establishment. All previous acts providing for ministers' salaries were repealed, Quaker and Mennonite ministers were empowered to perform marriages without a license, and in general the Episcopal Church was left to regulate its own affairs.⁴⁹

But Patrick Henry and the supporters of religious establish-

ment were not without power and influence, and in 1784 the legislature reversed its position, passing a bill to the second reading which stated that Virginia should promote the Christian religion and render financial aid to all religious sects. This was to be accomplished through a general assessment whereby each taxpayer would be allowed to select the church that should receive his tax. General Washington, Richard Henry Lee, John Marshall and Patrick Henry, joined by the Episcopal and Presbyterian clergy, supported the measure. They were opposed by Madison and Jefferson, who made a direct appeal to the people for support against the bill. Accordingly, a Memorial and Remonstrance, drafted by Madison, was circulated throughout the state for signature, declaring that under the Virginia Bill of Rights, no government could come to the aid of religion. So great was public opinion in favor of Madison's position that the legislature was compelled to abandon the bill.⁵⁰

These accomplishments of Madison were further embellished by the actions of Jefferson, who, sensing weakness in the opposition, now came forward with a proposal advocating complete religious freedom for all religious sects and for all dissenters. Entitled, "An Act Establishing Religious Freedom," this measure was enacted into law in 1786. Henceforth, no Virginian could be "compelled to support any religious worship, place, or ministry whatever; nor shall be enforced, restrained, molested, or burthened in his body or goods," nor otherwise caused "to suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities."⁵¹

Thus, after prolonged debate, Virginia emerged from the revolutionary period embracing the broadest sort of religious liberty possible. But at this juncture in the movement toward religious disestablishment, the Virginia experience was almost wholly unprecedented in America. On the eve of the Philadelphia Convention of 1787, the wall of separation doctrine espoused by Madison and Jefferson had been rejected in every state but Virginia and Rhode Island. Strictly speaking, of course, there was not an established church in any of the fourteen states at this time, for even in those states where a specifically identifiable sect or group of sects enjoyed a favored status, other religious denominations were allowed to worship as they pleased.⁵² In four states, Massachusetts, Connecticut, Vermont, and New Hampshire, the Congregationalist Church occupied a position of quasi-establishment as a result of direct or indirect benefits

conferred by the state constitutions and statutes. Ten states extended preferential treatment to the Protestant religion, and two states, Delaware and Maryland, favored simply the Christian religion. Add to this fact that, "Four [states], Pennsylvania, Delaware, and the Carolinas, required assent to the divine inspiration of the Bible. Two, Pennsylvania and South Carolina, demanded a belief in heaven and hell. Three, New York, Maryland, and South Carolina, excluded ministers from civil office. Two, Pennsylvania and South Carolina, emphasized belief in one eternal God. One, Delaware, required assent to the doctrine of the Trinity. And five, New Hampshire, Massachusetts, Connecticut, Maryland, and South Carolina, adhered to a religious establishment. In one, South Carolina, the obnoxious term *toleration* found a constitutional place."³

From the foregoing it would appear that there were basically three patterns of church-state relations in late eighteenth century America: quasi-establishment of a specific Protestant sect, as seen in most of New England; quasi-establishment of the Protestant religion, as seen throughout most of the nation; and the disestablishment of all religious sects, as seen in Rhode Island and Virginia. Three states adopted the position that allowed one sect of *Protestants*, viz., Congregationalists, to be preferred over other Protestant sects. Most of the states disclaimed all preference of one sect of *Protestants* over another. And two states, Virginia and Rhode Island, disclaimed all preference of *any* religious sect over another. Only two states, Delaware and Maryland (and possibly Georgia) disclaimed all preference of one sect of *Christians* over another. But all of the states still retained the Christian religion as the foundation stone of their social, civil and political institutions. Not even Rhode Island and Virginia renounced Christianity, and both states continued to respect and acknowledge the Christian religion in their system of laws.

Thus it may be seen that not only did nearly every state reject the Jeffersonian system of church-state relations, but most states also went beyond what is nowadays termed the "No Preference" theory of church-state relations, which holds that most states arranged matters in such a way that all religions would receive political support and none would be preferred over another. But in fact ten of the fourteen states at the time of the adoption of the Constitution simply refused to prefer one *Protestant* sect over another; that is, they placed Protestants in a preferred status over Catholics, Jews, and Dissenters. In the ensuing years, as we shall see, the standard to which most states ad-

vanced was more like that of Delaware and Maryland than that of Virginia. Thus it can be seen that in the formative period of the American political tradition of church-state relations, there is little room for the Rhode Island-Virginia model or for the historical interpretation introduced by the Supreme Court in 1947. Developments in the early nineteenth century, to which we now turn, show that most states continued to reject the concept of total separation after the adoption of the First Amendment.

DISESTABLISHMENT IN THE EARLY NINETEENTH CENTURY

It is important to keep in mind that the adoption of the Federal Constitution in 1789 and the Bill of Rights in 1791 had no legal effect whatsoever on church-state relations in the separate states. Article VI of the Constitution stipulated that "no religious test shall ever be required as Qualification to any Office or public trust under the United States;" and the First Amendment forbade Congress to pass any law "respecting an establishment of religion, or prohibiting the free exercise thereof." But as students of the Constitution have so frequently observed, "neither of these prohibitions was laid upon the individual states. . . . Broad as were the principles upon which the national government was based, the matter of church establishment or disestablishment, of taxation compulsory or by voluntary contribution, of test acts, oaths and religious qualifications for office, was left entirely to the discretion of the sovereign states."⁴ The significance of this fact in relation to the Supreme Court's involvement in the issue will be explored later; for the moment it is enough to say that "The real battle of religious liberty [and disestablishment] was fought out in the State legislatures and conventions."⁵

In New England, where the principal issue was financial support of religion, the established churches managed to retain their status in some states for more than a quarter of a century after the adoption of the First Amendment. Connecticut is a case in point. Here, the pillars of religious establishment were actually strengthened in 1791 by a law requiring dissenters to file certificates demonstrating proof of membership in a dissenting church in order to avoid the state tithe.⁶ Not until 1818, when a new constitution was narrowly adopted, did religious establishment cease to exist in Connecticut. Article I proclaimed the free exercise of religion and ordained that "no preference shall be given by law to any Christian sect."⁷ It was further stipulated in Article VII that "no person shall by law be compelled to join or

support, nor be classed with, or associated to, any congregation, church, or religious association."⁵⁸ Vermont, eleven years earlier, had already abandoned the practice of tithes and town-support of churches.⁵⁹

But New Hampshire stood against the tide of disestablishment. Although a new fundamental law was adopted in 1792, the provisions of the 1784 constitution providing for public support of "Protestant teachers of Piety" remained intact and were even extended to the constitution of 1912. The dominant position of the Congregationalist Church was nevertheless eroded by a series of legislative acts between 1792-1807 granting exemptions to Episcopalians, Baptists, and Methodists, which ultimately gave rise to a toleration act in 1819 granting complete freedom to all *Christian* sects.⁶⁰ Repeated attempts by dissenters to strike the words *Protestant* and *Christian* from the New Hampshire constitution were unsuccessful, however, and both were carried over to the revised constitution of 1889. The requirement that members of the state legislature be of the Protestant religion was not dropped from the state constitution until 1877.

Similarly, in Massachusetts, the movement toward disestablishment met with heavy resistance. In 1800 the state legislature passed a law requiring each town or parish to provide "a public Protestant teacher of piety." The statute further provided that delinquent towns were liable to heavy fines; and all citizens were required to cover the ministers' salaries and the costs of building and repairing the churches through public taxation.⁶¹ As late as 1832 one Nathaniel P. Fisher was arrested for refusing to pay a tax of \$2.38 which had been levied upon him at a town meeting.⁶²

Under Massachusetts law, the established church was a town institution, but the choice of ministers remained with the town meeting rather than the church itself. Surprisingly, this eventually worked to the disadvantage and ultimate defeat of the established Congregationalist Church. In 1818, the minister of the town of Dedham resigned. The non-communicants of the town united with the Unitarian minority in the church and at the town meeting a Unitarian was elected pastor. Most members of the church opposed the new pastor and moved their religious services to another location.⁶³ They subsequently brought suit for possession of the church property, but in *Baker v. Fales* (1820), the Supreme Judicial Court of Massachusetts ruled that they had no right to it. The constitution, stated the Court flatly, "gives to towns, not to churches, the right to elect the minister in

the last resort."⁶⁴ This decision prompted about half the towns in eastern Massachusetts to elect Unitarian ministers. Thus were the Congregationalists ejected from their own churches, "turned out of house and home by the very powers [they] had contrived to give [them] lasting security." Finally, in 1833, tithes were abolished, the towns were relieved of their responsibilities over church affairs, and the old Puritan church was formally disestablished.⁶⁵

In the middle-Atlantic states, where religious establishment was not so deeply entrenched, dissenters and minority sects encountered fewer obstacles. In 1792, Delaware quietly abandoned the religious oath of office, and in 1844 New Jersey finally discontinued her religious test for office. The New York constitution of 1821 removed the restrictions of the 1777 charter against naturalization of Catholics.⁶⁶ Pennsylvania, on the other hand, reached a compromise. The constitution of 1790 extended civil rights to non-believers but at the same time narrowed the liberty of public officeholders by requiring them to acknowledge "the being of God and a future state of rewards and punishments."⁶⁷ This requirement was retained in subsequent constitutions of Pennsylvania throughout the remainder of the nineteenth century.

The Old South rather cautiously followed the movement toward disestablishment. In the border state of Maryland, the power of the legislature to lay taxes for the support of the Christian religion was revoked by a constitutional amendment in 1810.⁶⁸ But throughout the remainder of the nineteenth century, the state held tenaciously to the constitutional requirement of 1776 that every public officeholder "subscribe [to] a declaration of his belief in the Christian religion." In North Carolina, where officeholders were required to affirm the truth of the Protestant religion under the constitution of 1776, an amendment was passed in 1835 substituting the word "Christian" for "Protestant."⁶⁹ By the terms of the constitution of 1876, however, "All persons who shall deny the being of Almighty God" were declared ineligible for public office.⁷⁰

The South Carolina constitution of 1790 formally disestablished the Protestant religion and abolished all religious tests for office.⁷¹ Reflecting a resurgence of religious belief, the constitution of 1868 stipulated, however, that persons denying the existence of God could not take office.⁷² Following the Rhode Island and Virginia model, the state of Georgia abolished all religious tests for office in 1789 and did not thereafter reinstate them.⁷³

Despite the unique achievements of Madison and Jefferson in

the 1780s, religious matters remained unsettled in the Old Dominion. To clarify the issue of whether the Bill of Rights was part of the constitution, the legislature repealed all laws in 1798-1799 seemingly in conflict with the Bill of Rights, thereby sealing the disestablishment of the Episcopal Church. There remained, however, the question of ownership of glebe lands, which had been originally given to the Church by the Crown. Rival sects often laid claim to the glebes on the theory that possession by the Episcopal Church constituted preference of one religion over another. To resolve the issue, the legislature enacted a statute in 1802 providing for the public sale of vacant glebe lands. This left most glebe lands in the hands of the Church. The Church nevertheless challenged the constitutionality of the act, and the Virginia Court of Appeals finally ended the controversy in 1840, affirming the position of the legislature.⁷⁴

The pattern of church-state relations in new states entering the Union after 1789 did not differ substantially from that in the original fourteen. By 1860—and the situation did not radically change for the next three quarters of a century—the quasi-establishment of a specific Protestant sect had everywhere been rejected; quasi-establishment of the Protestant religion was abandoned in most but not all of the states; and the quasi-establishment of the Christian religion still remained in some areas. A new pattern of church-state relations, the multiple or quasi-establishment of all religions in general, i.e., giving all religious sects a preferred status over disbelievers (the No Preference doctrine) became widespread throughout most of the Union. Thus at the turn of the century, for example, no person who denied the existence of God could hold office in such states as Arkansas, Mississippi, Texas, North Carolina, or South Carolina. Arkansas also discharged witnesses in court proceedings who uttered such denials. In Pennsylvania and Tennessee, public office was restricted to persons who “believe in God and a future state of reward and punishment.” Maryland required this belief in witnesses and jurors, but for officeholders demanded simply a belief in God.⁷⁵ Indeed, a good case can be made to show that during the latter part of the nineteenth and well into the twentieth centuries, the trend was not toward disestablishment but toward a strengthening of the ties between church and state. In the nineteenth century, for example, only one state (Massachusetts, 1826) required Bible reading in the public schools. Between 1913-1930, however, eleven more states enacted similar statutes.⁷⁶ Such practices as these are hardly in

accord with the putative notion that the Jeffersonian doctrine of church-state relations was increasingly popular from the moment of its inception until it was formally adopted by the Supreme Court.

Needless to say, this cursory treatment here of church-state relations in the late eighteenth and early nineteenth centuries is not intended to be definitive. A bare catalogue of church-state relations in all of the States before and after the adoption of the Constitution would require many volumes. But this survey of state constitutions and organic laws does indicate quite sufficiently that the doctrine of a total separation of church and state, or "no aid of any kind to religion," as the Supreme Court has put it, was not espoused or followed by any significant number of states in the formative era of the American Republic or in the early nineteenth century.

In many of the establishment cases, particularly those decided during the Vinson-Warren period, the Court has nevertheless been at pains to defend its position on historical grounds. From Justice Black's opinion in *Everson* through Clark's in *Schempp* (1963)⁷⁷ and the concurring opinions of Justices Douglas and Brennan in *Lemon v. Kurtzman* (1971),⁷⁸ there are lengthy discourses on religious liberty purporting to show a national acceptance, throughout American history, of the Jeffersonian proposition that the First Amendment built a "wall of separation" between church and state.

What strikes the critical student of the Constitution as peculiar is the fact the historical material dredged up by the Court, much of which relates to religious conflict in England in the seventeenth century, is totally irrelevant to the absolutist position the Court is attempting to substantiate, and invariably refers to the consequences and dangers of political aid to one religious sect rather than religion generally.⁷⁹

The Court has consciously based its interpretation of the establishment clause on the historical record. To comprehend the original understanding of separation of church and state, at the least a careful scrutiny of contemporary opinion from 1787 to 1791 and a review of state practices in the early Republic would seem essential. But the Court has made no such effort and has instead confined its historical inquiry to religious persecutions in Europe and the Virginia struggle against the Anglican establishment; and it has treated the rather unique Virginia experience, relying on carefully selected writings of Madison and Jefferson, to be that of the Congress of 1791 and of the nation at large. In the words of Justice Black, the Court has "recognized that the

provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute [of Religious Freedom of 1786]."⁸⁰

Does history support the Supreme Court's assertion that the First Amendment forbids governmental aid to religion? Here is the answer provided by the late Edward S. Corwin: "The historical record shows beyond peradventure that the core idea of 'an establishment of religion' comprises the idea of *preference*; and that any act of public authority favorable to religion in general cannot, without manifest falsification of history, be brought under the ban of that phrase. Undoubtedly the Court has the right to make history, as it has often done in the past; but it has no right to *make it up*."⁸¹ If Justice Clark's attitude on this issue is representative of the Court as a whole, the likelihood that the Court will cast aside Black's absolutism is slim. In *Schempp*, Clark indicated that the Court was weary of historical debate, and that as far as he and other members of the Court were concerned, the proper meaning of the establishment clause was settled. Objections by lawyers and scholars to the Court's distortion of history, declared Clark, "seem entirely untenable and of value only as academic exercises."⁸² Significantly, historical inquiry among the Justices into the origin and development of church-state relations, which never commanded the attention of the Court much beyond the pre-constitution experience of Virginia in the first place, has practically vanished since Justice Clark wrote these words. Yet it was Justice Black himself, the author of the *Everson* doctrine, who insisted that "[i]t is never to be forgotten that, in the construction of the language of the Constitution . . . we are to place ourselves as nearly as possible in the condition of the men who framed that instrument."⁸³ That almost every member of the Court has clung tenaciously to Black's absolutist interpretation of the establishment clause since 1947, in spite of the conflicting historical evidence, while at the same time rejecting his absolutist views on the other provisions of the First Amendment, is a curiosity of modern civil rights law that invites skepticism concerning the Court's self-proclaimed sincerity in seeking out the intent of the Framers in construing the Constitution.

Independent of these considerations, we are reminded that "the Supreme Court as a whole cannot indulge in historical fabrication without thereby appearing to approve the deterioration of truth a criterion for communication in public affairs."⁸⁴ The

importance of keeping the Court honest is a concern that all free men must share. "To the extent that dignity and honesty in the conduct of human affairs rest on the belief in historical objectivity," observes Sidney Hook, "reflection on it goes to the very heart of the question concerning the nature and possibility of liberal civilization. . . . There is a difference between using our knowledge of the history of the past in order to influence the future. . . and making or manufacturing a history of the past solely with an eye to achieve our aims."⁵⁵

JURISDICTION AND THE ISSUE OF INCORPORATION

During the Federal Convention of 1787, George Mason of Virginia proposed that a declaration of rights be included in the Constitution; but a motion offered by Elbridge Gerry that a committee be appointed to prepare such a statement was voted down unanimously, it being generally agreed that a bill of rights was not necessary since the expressly enumerated powers of the federal government did not include power over the rights in question. Without much of a struggle, however, the Federalist supporters of the Constitution agreed to the adoption of a bill of rights during the ratification effort in the state conventions. One reason they acceded to Anti-Federalist demands for a bill of rights was that such a declaration changed nothing regarding the constitutional structure, and neither reduced federal power nor increased state power. The Bill of Rights, in other words, simply declared what was already understood by the Framers of the Constitution — *viz.*, that the national government had no authority in the general area of civil liberties. Federalists and Anti-Federalists were in general agreement that the states, not the federal government, would determine under their own bills of rights the meaning and substance of civil liberty within their respective jurisdictions. The debate was thus over the proper wording of the Constitution regarding the *enforcement* of civil liberties rather than their substantive content.⁵⁶

As we previously noted, the Bill of Rights had a dual purpose: to protect each *individual* against the abridgment of civil liberties by the federal government, and to assure each *state* that the federal government would not encroach upon the jurisdiction of the states over such matters. The Bill of Rights, then, is essentially a states' rights document. Each amendment was a guarantee to the individual *and* to the states. Indeed, the federalism of the Bill of Rights was widely regarded in 1791 as far more im-

portant than the protection it afforded to the individual.⁸⁷ Odd as it may seem today, the First Amendment was not only a guarantee to the individual that Congress could not establish a national religion, but also a guarantee to the states that they were free to determine the meaning of religious establishment within their jurisdictions, and to newly establish, maintain, or disestablish religion as they saw fit.

Particularly significant in this regard is the fact that the First Congress, which proposed the Bill of Rights, rejected an attempt to apply portions of it to the states. The fifth resolution of James Madison's proposed series of amendments for a bill of rights provided that "[n]o *State* shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases."⁸⁸ Madison's proposal was defeated in the Senate. "This [proposal] is offered," Tucker of South Carolina observed, "as an amendment to the Constitution of the United States, but it goes only to the alteration of the Constitutions of particular States. It will be much better, I apprehend, to leave the State Governments to themselves, and not to interfere with them more than we already do; and that is thought by many to be rather too much."⁸⁹

For nearly a century and a half, the Supreme Court respected these views, thereby securing one of the major objectives of the Bill of Rights. Speaking for a unanimous Court, Chief Justice Marshall declared in *Barron v. Baltimore* (1833) that the first eight amendments "contain no expression indicating an intention to apply them to the state governments."⁹⁰ This position was consistently maintained in subsequent decisions involving the First, Fifth, Seventh, and Eighth Amendments between 1833-1868. In *Permoli v. New Orleans* (1845), for example, a unanimous Court upheld a municipal ordinance challenged by the Catholic Church, asserting that "[t]he Constitution makes no provision for protecting the citizens of the respective States in their religious liberties; this is left to the State constitutions and laws."⁹¹ And even after the adoption of the Fourteenth Amendment, which forbade any State from denying an individual life, liberty, and property, the Supreme Court continued to follow *Barron*—a fact strongly indicating that the Fourteenth Amendment was not intended by those who witnessed its creation and sought to apply its provisions to defeat the original purpose of the Bill of Rights.⁹² As late as 1922, in *Prudential Insurance Co. v. Cheek*, the Court declared that "neither the Fourteenth Amendment nor any other provision of the Constitution imposes restrictions upon the States about freedom of speech."⁹³

The Court suddenly reversed itself in 1925 when it offhandedly remarked in *Gitlow v. New York* that "[f]or present purposes we may and do assume that freedom of speech and of press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and liberties protected by the due process clause of the fourteenth amendment from impairment by the states."⁹⁴ Thus began the piecemeal incorporation of the First Amendment into the word "liberty" of the due process clause of the Fourteenth Amendment, reversing *sub silentio* the *Barron* ruling and thereby undermining one of the great objects of the Bill of Rights by applying it to the states. In 1931, in *Near v. Minnesota*,⁹⁵ the Court embarked upon the revolutionary course outlined in *Gitlow* by incorporating freedom of speech and press into the Fourteenth Amendment. In subsequent cases, the Court arbitrarily transferred freedom of assembly and freedom of religion⁹⁶ to the Fourteenth Amendment, finally completing the incorporation of the First Amendment with the inclusion of the establishment clause in *Everson*.⁹⁷

As Professor Corwin has amply demonstrated, the application of the establishment clause to the states through the due process clause requires a rather bizarre juggling of words and artful manipulation of legal and historical precedents. In the first place, "the principal importance of the [First] Amendment lay in the separation which it effected between the respective jurisdictions of state and nation regarding religion, rather than its bearing on the question of the Separation of Church and State."⁹⁸ In other words, it is the federalism of the First Amendment, and the desire of Congress in 1791 to assure the states that the new national government would have no authority over the subject of church-state relations, that explains the underlying purpose of the establishment clause of the First Amendment. The refusal of the Court to recognize this significant aspect of the Amendment has, in the view of Mark de Wolfe Howe, led the Court "to disregard—even to distort—the intellectual background of the First Amendment."⁹⁹ The Court, Howe has suggested, has arbitrarily embraced the erroneous idea "that the policies of freedom and equality enunciated in 1868 in the Fourteenth Amendment must be read back into the prohibitions of the First Amendment—the familiar process of incorporation carried out, as it were, in reverse. The consequences may be admirable law, but it is... distorted history."¹⁰⁰ What the delegates in the various state ratifying conventions in 1787-1788 sought

was a guarantee that the new national government would neither set up a national church nor interfere with the various types of

establishments, quasi-establishments, and church-government arrangements existing in several states. Thus, New Hampshire proposed an amendment which read: "Congress shall make no laws touching religion..." Since the Constitution of New Hampshire provided special privileges for the Protestant religion, the amendment was very likely aimed at excluding the new government from passing any law that might 'touch' [i.e. alter] their particular type of establishment.¹⁰¹

Against this backdrop, it requires no little skill to reconcile the original understanding of the First Amendment with Mr. Justice Rutledge's disingenuous reading of the establishment clause in *Everson*:

The Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.¹⁰²

Unless it be assumed that the establishment clause was an invitation to the national government to interfere with existing church-state relations, Rutledge's generally accepted interpretation of the First Amendment among members of the Court is wholly unhistorical. No such assumption is supportable on the record; indeed a number of the states, as we have seen, already had some form of existing establishment or quasi-establishment at the time of adoption, and it is difficult to believe that they ratified the establishment clause with the understanding that "The First Amendment put an end to placing any one church in a preferred position."¹⁰³ One is tempted to conclude, therefore, that the modern Court, by applying the establishment clause to the states, has accomplished the very purpose which that clause was designed to prevent — viz., the involvement of the national government in the religious affairs of the several states.

If it could be demonstrated satisfactorily that the Framers of the Fourteenth Amendment deliberately sought to apply the Bill of Rights to the States, and to reverse both *Barron v. Baltimore* and *Permoli v. New Orleans*, then the original purpose of the establishment clause would not be paramount. The intent of the Framers of 1868 would have superseded that of the Framers of 1791. But again, there is a paucity of evidence to support such a proposition; and there is an abundance of documentary material

drawn for the debates of the 39th Congress and contemporaneous newspapers throughout the Union which, thanks to the research of Charles Fairman, points to the conclusion that the Fourteenth Amendment was not intended to confer jurisdiction over the First Amendment to the federal government or upset *Barron*.¹⁰⁴

With respect to the establishment clause itself, another constitutional scholar has observed that "a conclusive argument against the incorporation theory, at least as respects the religious provisions of the First Amendment, is the 'Blaine Amendment' proposed in 1875."¹⁰⁵ That year, James Blaine of Maine introduced an important resolution in the Senate, upon the recommendation of President Grant, which provided that: "No *State* shall make any law respecting an establishment of religion or prohibiting the free exercise thereof." Significantly, the Congress which considered the Blaine Amendment included twenty-three members of the 39th Congress which adopted the Fourteenth Amendment.

Not one of the several Representatives and Senators who spoke on the proposal even suggested that its provisions were implicit in the amendment ratified just seven years earlier. . . . Senator Stevenson, in opposing the proposed amendments, referred to Thomas Jefferson: "Friend as he [Jefferson] was of religious freedom, he would never have consented that the States. . . should be degraded and that the Government of the United States, a Government of limited authority, a mere agent of the States with prescribed powers, should undertake to take possession of their schools and of their religion." Remarks of [other Members of Congress]. . . give confirmation to the belief that none of the legislators in 1875 thought the Fourteenth Amendment incorporated the religious provisions of the First.¹⁰⁶

Thus the debates on both the adoption of the Fourteenth Amendment and the rejection of the Blaine Amendment reveal a general understanding among the participants that the Fourteenth Amendment left undisturbed the system of church-state relations established under the Bill of Rights.

CONCLUSION

A strong case can be made to show that the Supreme Court has adopted a constitutional doctrine nationalizing the establishment clause which the Framers of the Bill of Rights and the Fourteenth Amendment clearly rejected. First, the Court ignores the federalism of the First Amendment. The common

understanding in 1791, and for more than a century thereafter on the question of church-state relations, is unmistakably clear: A principal underlying purpose of the First Amendment was to prevent the national government from usurping the powers of the states over the subject of church-state relations, and to reaffirm the authority or right of each state to define, without federal interference, the nature of those relations within its own boundaries. The establishment clause, applying only to the federal government, was calculated to prevent not only the establishment of a national church, but to safeguard and leave undisturbed existing relations between church and state at the state and local level. Second, there is serious doubt whether the Fourteenth Amendment was intended by its framers and backers to nationalize the establishment clause. And third, "the prohibition on the establishment of religion by Congress is not convertible into a similar prohibition on the States, under the authorization of the Fourteenth Amendment, unless the term 'establishment of religion' be given an application which carries with it invasion of somebody's freedom of religion, that is, of 'liberty.'"¹⁰⁷ Taken together, these are powerful denials of the Court's right to assume jurisdiction over cases involving state aid to religion.

A Final Note. Since 1975, Senator Jesse Helms (R-NC) has been introducing legislation to deny all federal courts jurisdiction over cases involving voluntary prayer in the public schools, and in 1979 such a measure passed in the Senate.¹⁰⁸ Should such legislation be enacted by Congress, it would represent the first step in the arduous process of restoring the Bill of Rights to its original purpose; for its effect would be to lodge in the highest courts of each state final authority over questions involving such practices. Senator Helms has again introduced this measure in the 97th Congress, and it is expected that the Separation of Powers Subcommittee of the Senate Judiciary Committee will begin consideration of the bill in early 1982. Whether it succeeds or fails, it will serve to focus public attention on the origin and nature of both the establishment clause and the Bill of Rights generally, while possibly generating debate on the doctrine of incorporation itself, certainly a debate going to the very heart of the question of whether it is either wise or proper for nine unelected officials to possess the incredible power of deciding what our freedoms shall be.

REFERENCES

1. The Virginia Declaration of Rights of 1776 proclaimed the principle of religious liberty, but not until 1779 was the Anglican Church disestablished; even so, the complete separation of church and state did not come about until the adoption of the Virginia Statute of Religious Liberty—drafted by Thomas Jefferson and enacted by the Virginia legislature on January 16, 1786.
2. Joseph Story, III, *Commentaries on the Constitution* §1871 (1833) (Emphasis added). For an analysis of Justice Story's position, including his refutation of Jefferson's assertion that Christianity was not a part of the common law, see my study of Story's jurisprudence in James McClellan, *Joseph Story and the American Constitution* (Norman, Oklahoma: University of Oklahoma Press, 1971), pp. 118-59.
3. For an extended discussion of this issue, see McClellan, *supra* n. 2 at pp. 142-59.
4. *Everson v. Board of Education*, 330 U.S. 1 (1947).
5. *Id.* at p. 8.
6. *Id.* at pp. 15, 16. (Emphasis added.)
7. *Id.* at p. 15. The phrase is taken not from the Constitution, of course, but from a letter which Jefferson wrote to the Baptist Association of Danbury, Connecticut in 1802. It reads in part: "I contemplate with sovereign reverence that act of the whole American people, which declared that *their legislature* should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and state." [As quoted with emphasis added, in Charles Rice, *Supreme Court and Public Prayer* (New York: Fordham University Press, 1964), p. 63.] The term "their legislature" clearly refers to Congress. Jefferson never suggested that the several states built a "wall of separation" between their governments and religion.
8. *McCullom v. Champaign Board of Education*, 333 U.S. 203 (1948).
9. *Id.* at p. 210. In *Zorach v. Clauson*, 343 U.S. 306 (1952), however, the Court upheld a New York "dismissed time" program of religious instruction which, unlike that in Illinois, dismissed children from public schools at the request of their parents to attend religious class off school grounds. The Court attempted to distinguish the two cases by pointing out that the New York plan did not involve the use of public property during the time of religious instruction. In 1879, a taxpayer attempted to restrain Illinois school authorities, acting under a statute, from allowing a school to be used as a religious meeting house. The Supreme Court of Illinois upheld the law, arguing that "religion and religious worship are not so placed under the ban of the (state) Constitution that they may not be allowed to become recipients of any incidental benefit whatever from the public bodies or authorities of the state." *Nichols v. The School Directors*, 93 Freeman 61 (Illinois) 1879.
10. *Engel v. Vitale*, 370 U.S. 421 (1962).
11. *Id.* at p. 425. In *Chamberlain v. Dade County Board of Instruction*, 377 U.S. 402 (1964), the Court reversed a Florida state Supreme Court ruling which had upheld public school prayers and "devotional" Bible-reading, even though the state court had enjoined the holding of Christmas and Chanukkah programs and the showing of religious films; and in *Dekalb County Community School District v. DeSpain*, 390 U.S. 906 (1968), the Court upheld a lower court decision holding that a prayer recited in verse form by kindergarten children was still a prayer, although the words "God" and "Amen" had been eliminated from it.
12. *Abington School District v. Schempp*, 374 U.S. 225 (1963).
13. *Board of Education v. Allen*, 392 U.S. 236 (1968).
14. *Id.* at pp. 243-44.
15. *Id.* at p. 243. See *Abington School District v. Schempp*, 374 U.S. at p. 222.
16. *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970).

17. *Compare, Tilton v. Richardson*, 403 U.S. 672 (1971) and *Hunt v. McNair*, 413 U.S. 734 (1973) (The First Amendment does not forbid federal or state grants to church-related colleges for the construction of buildings) to *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (The First Amendment forbids state grants to nonpublic primary and secondary schools for maintenance and repair of existing facilities).
18. *Compare, Everson v. Board of Education*, 330 U.S. 1 (1947) (The First Amendment does not forbid reimbursement for transportation to nonpublic schools) to *Wolman v. Walter*, 433 U.S. 229 (1977) (The First Amendment forbids State funding of field trips for nonpublic schools).
19. *Compare, Board of Education v. Allen*, 392 U.S. 236 (1968) (The First Amendment does not forbid state loans of textbooks to nonpublic schools) to *Wolman v. Walter*, 433 U.S. 229 (1977) (The First Amendment forbids state funding of maps for nonpublic schools).
20. In *Walt v. Tax Commission of the City of New York*, 397 U.S. 664 (1970), the Court upheld property tax exemptions to religious organizations, but in *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) ruled that tax relief for tuition payments to nonpublic schools was unconstitutional.
21. *Wolman v. Walter*, 433 U.S. 229, 263 (1977).
22. D. Meiklejohn, *Religion in the Burger Court: The Heritage of Mr. Justice Black*, 10 Indiana Law Review 647 (1977).
23. *Id.*
24. Under the "Duke's Laws" of 1664, every township in the colony of New York was obliged to support a Protestant church and minister. This, in effect, allowed the Dutch Reformed Church to remain as the established church in most localities, since a majority of the settlers were Dutch. In 1686, James II instructed the Royal Governor of New York to establish the Anglican Church in the colony; but the governor failed to act. Finally, in 1693, the colonial assembly enacted a peculiar bill which seemed to establish the Anglican Church in a few designated counties. This confused situation was clarified in 1731 by the provincial court of New York, which accepted the claim of the Presbyterians to hold the Jamaica Church of Queens (sought by the Anglicans) and to collect taxes for its support. This decision allowed each community to establish and support a Protestant church of its own choosing, and the establishment of the Anglican Church was rendered a legal fiction. See Sanford Hoadley Cobb, *The Rise of Religious Liberty in America*, (New York: Johnson Reprint Corporation, 1970).
25. William Sweet, *The Story of Religion in America* (New York: Harper Publishing Company, 1950), p. 189.
26. Benjamin Perley Poore, I, II, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States* (Washington, D.C.: Government Printing Office, 1877), pp. 1596-97.
27. Cobb, *supra* n. 24, p. 501.
28. Poore, II, *supra* n. 26, pp. 1280-81.
29. *Id.* at p. 1286.
30. *Id.* at I, p. 957.
31. *Id.* at p. 970.
32. *Id.* at II, p. 1859.
33. *Id.* at p. 1861.
34. Cobb, *supra* n. 24, p. 517. Vermont was originally claimed by Massachusetts, New Hampshire, and New York. At the outbreak of the Revolution she sought independence not only from Great Britain but from these States as well. In 1781 and 1782, New Hampshire and Massachusetts assented to her independence, but it was 1790 before New York consented to Vermont's formal admission into the Union.

35. Poore, *supra* n. 26, at II, p. 1339.
36. Story, *supra* n. 2, at I, §114.
37. Poore, *supra* n. 26, at II, p. 1313. The 1776 Constitution provided further that no person should "ever be obliged to pay tithes, taxes or any other ratés, for the purpose of building or repairing any other church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or has deliberately or voluntarily engaged himself to perform."
38. *Id.* at I, p. 276.
39. Cobb, *supra* n. 24, p. 483.
40. Poore, *supra* n. 26, at II, p. 1541.
41. *Id.* at p. 1543.
42. *Id.* at I, p. 819. The protection of religious liberty was restricted to "all persons professing the Christian religion." The term "Christian" rather than "Protestant" was used apparently because of the presence of a large Catholic population.
43. *Id.* at II, p. 1413.
44. *Id.* at pp. 1626-27.
45. *Id.* at I, p. 383.
46. Reba Carolyn Strickland, *Religion and the State of Georgia in the Eighteenth Century* (New York: Columbia University Press, 1939), p. 164.
47. Poore, *supra* n. 26, at I, p. 379.
48. Cobb, *supra* n. 24, pp. 490-92.
49. *Id.* at pp. 493-94.
50. *Id.* at pp. 495-97.
51. *Id.* at pp. 497-98. See, Leonard Williams Levy, *Judgments: Essays on American Constitutional History* (Chicago: Quadrangle Books, 1972), pp. 200-01.
52. In Massachusetts, for example, "(i)t was not an establishment like that of the Church of England . . . because the Legislature had no power to regulate doctrine and enforce conformity; and because dissenters received a share of the taxes levied for religious purposes. Consequently, it is more technically accurate to describe the Congregationalist order as favored rather than legally established in Massachusetts." John Francis Thorning, *Religious Liberty in Transition* (Washington, D.C.: The Catholic University of America, 1931), p. 27.
53. Cobb, *supra* n. 24, p. 507. Actually four states excluded ministers from public office, after Georgia adopted a new constitution in 1789. See Article I, §18 in Poore, *supra* n. 24, at I, p. 385.
54. Thorning, *supra* n. 52, p. 3. See also Cobb, *supra* n. 24, p. 510. Issac Cornelison, *The Relation of Religion to Civil Government in the United States of America* (New York: Putnam, 1895), pp. 95, 111.
55. Thorning, *supra* n. 52, p. 7.
56. Cobb, *supra* n. 24, p. 512.
57. Poore, *supra* n. 26, at I, p. 259.
58. *Id.* at p. 264.
59. Cobb, *supra* n. 24, p. 517.
60. *Id.* at p. 516.
61. Cornelison, *supra* n. 54, p. 106.
62. *Id.* at p. 108.
63. *Id.* at p. 109.
64. *Baker v. Fales*, 16 Massachusetts 487 (1820).
65. Cornelison, *supra* n. 54, p. 110. Religious tests for office were abolished at the State constitutional convention of 1820.
66. See, Poore, *supra* n. 26, pp. 278-88 (Delaware); II, pp. 1314-25 (New Jersey); II, pp. 1341-51 (New York).

67. *Id.* at II, p. 1554.
68. *Id.* at I, p. 832.
69. *Id.* at II, p. 1418.
70. *Id.* at p. 1446.
71. *Id.* at pp. 1632-3.
72. *Id.* at p. 1663.
73. See *id.* at I, pp. 384-426.
74. Cobb, *supra* n. 26, pp. 511-12.
75. *Id.* at p. 520.
76. Pennsylvania, 1913; Delaware and Tennessee, 1915; New Jersey, 1916; Alabama, 1919; Georgia, 1921; Maine, 1923, Kentucky, 1924; Florida and Idaho, 1925; Arkansas, 1930. Avin Johnson and Frank Yost, *Separation of Church and State in the United States* (New York: Greenwood Reprint Company, 1948), p. 33.
77. *Abington School District v. Schempp*, 374 U.S. 203 (1963).
78. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).
79. McClellan, *supra* n. 2, pp. 135-36.
80. *Everson v. Board of Education*, 330 U.S. 13 (1947).
81. Edward S. Corwin, "The Supreme Court as a National School Board," as reprinted in *A Constitution of Powers in a Secular State* (Charlottesville, Virginia: Michie Company, 1951), p. 116.
82. *Abington School District v. Schempp*, 374 U.S. at p. 217.
83. *Adamson v. California*, 332 U.S. 72 (1947). "An Amendment to the Constitution should be read," said Justice Frankfurter in the same case, "in a sense most obvious to the common understanding at the time of its adoption." *Id.* at p. 63.
84. Charles Miller, *The Supreme Court and the Uses of History*, (Cambridge, Massachusetts: Harvard University Press, 1969), p. 195.
85. Sidney Hook, as quoted in Miller, *id.*
86. In *The Federalist* No. 45, James Madison explained that "the powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement and prosperity of the State." *The Federalist* p. 303 (Modern Library Edition).
87. Six of the States which ratified the Constitution before it went into effect proposed lengthy lists of amendments. "It has frequently been stated that the motive behind these amendments was a desire to secure greater protection for the natural rights of the people. This is true only in part. An examination of the proposals of the first three states to make them, Massachusetts, South Carolina, and New Hampshire, will afford sufficient evidence of the fact that the members of these conventions were much more perturbed about the rights and powers of the states than about the rights of the people." Massachusetts proposed nine amendments but only the sixth, referring to indictment by grand jury, dealt with individual liberty as such. In one place the short list proposed by South Carolina makes mention of "the freedom of the people," but otherwise it deals with the issue of the "sovereignty of the states." Of the twelve proposed amendments offered by New Hampshire, only the last three have a direct bearing on individual liberty. Only Virginia and North Carolina, it seems, proposed a true bill of rights to the people. Benjamin Wright, *American Interpretations of Natural Law* (Cambridge, Massachusetts: Harvard University Press, 1931), p. 147.
88. As quoted in McClellan, *supra* n. 2, p. 147.
89. *Id.* at pp. 147-48.
90. *Barron v. Baltimore*, 7 Peters 250 (1833).
91. *Permoli v. New Orleans*, 3 Howard 609 (1845).

92. See C. Warren, *The New "Liberty" Under the Fourteenth Amendment*, 34 *Harvard Law Review* 436 (1926).
93. *Prudential Insurance Company v. Cheek*, 259 U.S. 530 (1922).
94. *Gittlow v. New York*, 268 U.S. 666 (1925).
95. *Near v. Minnesota*, 283 U.S. 697 (1931).
96. *DeJonge v. Oregon*, 299 U.S. 353 (1937) [freedom of assembly]; *Cantwell v. Connecticut*, 310 U.S. 296 (1940) [Free exercise of religion].
97. Since 1961 the doctrine of incorporation has been extended beyond the First Amendment to the Fourth, Fifth, Sixth, Eighth and Ninth Amendments. See e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968).
98. Corwin, *supra* n. 81, p. 106.
99. Mark Howe, *The Garden and the Wilderness: Religion and Government in American Constitutional History*, (Chicago: University of Chicago Press, 1965), p. 31.
100. *Id.*
101. Francis O'Brien, *Justice Reed and the First Amendment*, (Washington, D.C.: Georgetown University Press, 1958), p. 134. The significance of the word "respecting" in the establishment clause should thus be noted: Congress is to make no law "respecting" (i.e., dealing with the subject of) the establishment of religion, so that existing church-state relations in each State shall remain undisturbed. In the words of Justice Story: "the whole power over the subject of religion is left exclusively, to the State governments, to be acted upon according to their own sense of justice, and the State constitutions." Story, *supra* n. 2, at III, §1873. Jefferson embraced the same view: "I consider the government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises. This results not only from the provision that no law shall be made respecting the establishment or free exercise of religion, but from that also which reserves to the States the powers not delegated to the United States. Certainly, no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the General Government. It must then rest with the States...." Jefferson to Rev. Samuel Miller, XI, *The Writings of Thomas Jefferson* (Washington, D.C.: Andrew Lipscomb Co., 1903-04, issued under the auspices of the Thomas Jefferson Memorial Association of the United States), p. 428.
102. *Everson v. Board of Education*, 330 U.S. 1, 31 (Rutledge, J. concurring).
103. *Engel v. Vitale*, 370 U.S. at p. 442 n. 7 (Douglas, J. concurring).
104. See C. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 *Stanford Law Review* 5-139 (1949).
105. O'Brien, *supra* n. 101 at p. 116.
106. *Id.* at pp. 116-17. "A majority of people in any state in this union can, therefore, if they desire it," said Blaine in an "open letter" to *The New York Times*, "have an established church..." Francis O'Brien, *The States and "No Establishment": Proposed Amendments to the Constitution Since 1798*, 4 *Washburn Law Journal* 188 (1965). Between 1876-1930, notes O'Brien, nineteen separate amendment proposals were introduced without success in Congress for the purpose of making the religious provision of the First Amendment binding on the States. *Id.* at p. 210. See also A. Meyer, *The Blaine Amendment and the Bill of Rights*, 64 *Harvard Law Review* 939 (1951).
107. Corwin, *supra* n. 81, at p. 116. Under the doctrine of incorporation, the Court interprets the word "liberty" of the due process clause to include the absence of an established religion, even though it is not a personal liberty like freedom of speech, press, assembly or religion that an individual can exercise. Nevertheless, it is not necessary, according to the Court, for parties protesting state religious programs to produce evidence that their religious liberty has in any way been abridged. As the Court asserted in *Schempp*: "It goes without saying that the laws and practices involved here can be challenged only by persons having standing to complain.

But the requirements for standing to challenge state action under the establishment clause, unlike those relating to the free exercise clause, do not include proof that particular religious freedoms are infringed." *Abington School District v. Schempp*, 374 U.S. at p. 224. Why the requirements should not be the same for the free exercise clause and the establishment clause the Court has not explained. Moreover, there is a compelling argument that by its actions the Court itself has denied the right of free exercise to a majority of public school children, who are in effect compelled through a combination of federal court rulings and state compulsory school attendance laws to shed their constitutional rights of religious freedom while under the control of government authorities.

108. The Helms Amendment to S. 210, 96th Cong., 1st Sess. was subsequently shifted to S. 450, a bill dealing with the jurisdiction of the Supreme Court. The House Judiciary Committee, however, refused to take action on the measure. See Gerald Gunther, *Constitutional Law* (Mincola, New York: Foundation Press, 1979 Supplement) pp. 1-2. Proposed amendments to the Constitution to reverse the Prayer Decision have been introduced in most sessions of Congress since 1962, that sponsored by Everett Dirksen (R.-Ill.) achieving the widest support. On September 21, 1966, Dirksen carried a majority with him, but the vote of 49-37 fell short of the two-thirds majority necessary to propose a constitutional amendment. Dirksen's proposed amendment (S.J. Res. 148) was one of 150 measures introduced in the 88th Congress to reverse the Court's holding in the Prayer Decision. See Congressional Quarterly, *II Congress and the Nation*, pp. 410-11 (1969).

CONGRESSIONAL RETRACTION OF FEDERAL COURT JURISDICTION OVER THE RESERVED POWERS OF THE STATES: THE HELMS PRAYER BILL AND A RETURN TO FIRST PRINCIPLES

(By James McClellan*)

Since the earliest days of the Warren Court, countless bills have been introduced in Congress which would deny the federal courts jurisdiction over a great variety of subjects ranging from busing to abortion.¹ The exceptions clause of article III of the Constitution provides Congress with the authority to enact such bills.² While none of these proposed bills has been enacted into law, it is noteworthy that two have passed at least one house of Congress, and that both of these have sought to deny all federal courts, including the Supreme Court, jurisdiction over certain cases arising under the fourteenth amendment. The first of these two bills, introduced by Representative William Tuck of Virginia in the 88th Congress in 1964, would have eliminated federal court jurisdiction over state legislative apportionments. It passed the House of Representatives but was defeated in the Senate.³ The second measure, the Helms Prayer Bill,⁴ passed the Senate two years ago but failed to get out of the House Judiciary Committee. The Helms Bill sought to deny all federal court jurisdiction over cases involving voluntary prayer in the public schools.⁵ Its chief sponsor was Senator Jesse Helms of North Carolina, who has been introducing similar legislation since 1974. He has again introduced it in the 97th Congress, and its chances of passage seem excellent, not only because it passed before under a Democrat-controlled Senate, but also because it was endorsed by the Republican Party platform of 1980 and apparently also by President Reagan.⁶

These bills limiting jurisdiction all have one subject in common: They all deal with civil rights issues. This is true of every bill introduced since 1957 which has challenged the jurisdiction of the federal courts.⁷ Moreover, these bills all involve

*Chief counsel and staff director, Separation of Powers Subcommittee, Committee on the Judiciary, U.S. Senate, B.A., University of Alabama, 1960; Ph. D. 1964, J.D., 1981, University of Virginia.

¹ See Baucus & Kay, *The Court Stripping Bills: Their Impact on the Constitution, the Courts, and Congress*, 27 Vill. L. Rev. —, — (1982).

² U.S. Const. art. III, § 2, Cl. 2. The exceptions clause states: "the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." *Id.*

³ See H.R. 11926, 88th Cong., 2d Sess. (1964).

⁴ S. 210, 96th Cong., 1st Sess. (1979). See also note 5 and accompanying text *infra*.

⁵ The Helms Prayer Bill originally was an amendment to a bill which created the Department of Education. S. 210, 96th Cong., 1st Sess. (1979). The amendment proposed by Senator Helms have added two new sections to 28 U.S.C.:

"§ 1259. Notwithstanding the provisions of sections 1253, 1254, and 1257 of this chapter the Supreme Court shall not have jurisdiction to review, by appeal, writ of certiorari, or otherwise, any case arising out of any State statute [which] relates to voluntary prayers in public schools and public buildings.

"§ 1364. Notwithstanding any other provision of law, the district courts shall not have jurisdiction of any case or question which the Supreme Court does not have jurisdiction to review under Section 1259 . . . S. 210, 96th Cong., 1st Sess. (1979). The Helms amendment was subsequently attached to a bill dealing with the jurisdiction of the Supreme Court. See S. 450, 96th Cong., 1st Sess. (1979). The House Judiciary Committee, however, refused to take action on the measure. See G. Gunther, *Constitutional Law* 57 (10th ed. 1980); G. Gunther, *Constitutional Law* 1 (1981 Supp.).

Proposed amendments to the Constitution which would reverse the Supreme Court's decision on prayers in public schools have been introduced in most sessions of Congress since 1962. Such an amendment sponsored by Senator Everett Dirksen during the 88th Congress achieved the widest support. On September 21, 1966, Dirksen carried a majority of the Senate with him, but the vote of 49-37 fell short of the two-thirds necessary to propose a constitutional amendment. Dirksen's proposed amendment (S.J. Res. 148) was one of the 150 measures introduced in the 88th Congress to reverse the Court's holding in the prayer decision. See 2 Congress and the Nation 410-11 (1969).

⁶ The Republican Party platform states: "We support Republican initiatives in the Congress to restore the right of individuals to participate in voluntary, non-denominational prayer in schools and other public facilities. We applaud the action of the Senate in passing such legislation." Cong. Q. 2035 (July 19, 1980). President Reagan specifically supported congressional efforts to restore voluntary prayer in the schools in an interview with reporters from the Washington Star. The text of the interview is printed in the Washington Star, August 5, 1981, at A-4.

⁷ During the Warren Court years, Congress was provoked by several of the Court's decisions. In response, the Jenner-Butler Bill was introduced to curtail Supreme Court jurisdiction over cases involving subversive activity and state bar admission. S. 2646, 85th Cong., 1st Sess. (1957).

the fourteenth amendment. While a few deal with rights under the equal protection clause, the overwhelming majority—of which the Helms Bill is representative—affect rights guaranteed by the Bill of Rights as applied to the states through the due process clause of the fourteenth amendment. Individually considered, they represent a rejection of specific Supreme Court holdings. Taken together, however, they reveal a distinct pattern of widespread dissatisfaction with the Court's nationalization of the Bill of Rights, or what is commonly referred to as the doctrine of incorporation.⁸ Although no member of Congress has articulated the conflict in quite these terms, it is clear that what we are witnessing is something more than random dissatisfaction with judicial legislation. More fundamentally, these legislative efforts to reverse the Court are part of a growing, and increasingly popular, movement in Congress to return power over civil rights to the states. The controversy, then, is not simply about the substantive meaning of these rights, but about federalism. It is not simply about what our rights are, but about who is to say what they are.

Indeed, none of the bills limiting federal court jurisdiction introduced over the past twenty years has sought to impose upon the American people of the states a single-minded, monolithic definition of a particular liberty guaranteed by the Bill of Rights or by the fourteenth amendment. Instead, these bills invariably seek to lodge final review in the state supreme courts and to allow the states to decide for themselves the content of individual freedom.⁹ Thus, the thrust of this legislation is not uniformity, but diversity. As I shall presently argue, this is not only entirely in keeping with the original purpose of the Bill of Rights, but also is a modest attempt at restoring the original design of our constitutional system. Our federal system, as originally conceived, left the individual states free to define the civil rights of their citizens because the Bill of Rights was applicable only to the federal government.¹⁰ Nevertheless, this system has been radically altered—without an explicit constitutional amendment and without public debate over the merits of the alteration—by the Supreme Court's incorporation of the Bill of Rights into the word "liberty" in the due process clause of the fourteenth amendment.¹¹

Turning back to the period during which the Bill of Rights was considered and adopted, we recall that it was George Mason of Virginia who proposed at the Constitutional Convention of 1787 that a declaration of rights be included in the Constitution.¹² Yet, Elbridge Gerry's motion that a committee be appointed to prepare such a statement was voted down unanimously. The members of the Convention generally agreed that a bill of rights was unnecessary since the expressly enumerated powers of the federal government did not include power over "the liberties of the people."¹³ Without much of a struggle, however, the Federalist supporters of the Constitution agreed to the adoption of a bill of rights during the ratification effort in the state convention.¹⁴ One reason they so readily acceded to Antifederalist demands for a bill of rights was that such a declaration changed nothing regarding the constitutional structure, and neither reduced federal power nor increased state power.¹⁵ The Bill of Rights, in other words, simply declared what was already un-

The Jenner-Butler Bill thus represents the first of a continuing series of bills which seek to withdraw the jurisdiction of the Supreme Court and/or the lower federal courts in cases relating to certain specified civil rights.

⁸ For a discussion of the doctrine of incorporation, see notes 29-46 and accompanying text *infra*.

⁹ There are opposing views regarding the effect of withdrawal of Supreme Court jurisdiction. One writer, proceeding upon the assumption of judicial supremacy argues that once the Court's jurisdiction is removed, its prior decisions on the issue will be "frozen." Thus, the state courts by virtue of their obligation under the supremacy clause, will be forced to uphold the presumably unpopular Supreme Court decisions on the issue. See Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 Vill L. Rev.—,—(1982).

Most scholars agree, however, that once the Supreme Court's appellate jurisdiction is removed, the state courts would be free to interpret the Constitution as they saw fit and could disregard prior Supreme Court decisions. See Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 Vill L. Rev.—,—(1982).

¹⁰ For the discussion of how the Framers viewed the Bill of Rights, see text accompanying notes 12-17.

¹¹ For a discussion of the doctrine of incorporation, see text accompanying notes 29-46 *infra*.

¹² See 5 J. Elliot, *The Debates of the Adoption of the Federal Constitution* 538 (1888). See also J. Madison, *Notes on Debates in the Federal Convention of 1787* 630 (A. Koch ed. 1966); B. Wright, *American Interpretations of Natural Law* 124-26 (1931).

¹³ See 5 J. Elliot, *supra* note 12, at 538; J. Madison, *supra* note 12, at 630. See generally B. Schwartz, *The Bill of Rights: A Documentary History* 437-38 (1971).

¹⁴ See B. Schwartz, *supra* note 12, at 762-66, 852, 932-33.

¹⁵ See *id.* See also J. McCellan, *Joseph Story and the American Constitution* 145 (1971).

derstood by the Framers of the Constitution—that the national government had no authority in the general area of civil liberties. Thus, Federalists and Antifederalists were in general agreement that the States, not the federal government, would determine under their own bills of rights the meaning and substance of civil liberty within their respective jurisdictions. As James Madison explained in the *Federalist*, “the powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement and prosperity of the State.”¹⁶ Consequently, the debate in 1787 was not over the substantive meaning of the civil liberties, but rather over the issue of whether the Constitution should be explicit regarding their enforcement.¹⁷

It is important to bear in mind, therefore, that the Bill of Rights actually had a dual purpose: to protect each individual against the abridgment of his civil liberties by the federal government, and to assure each state that the federal government would not encroach upon the jurisdiction of the states over such matters. In the latter regard, the Bill of Rights is essentially a states’ rights document. Each amendment was a guarantee to the individual and to the states. Indeed, the protection of state’s rights by the Bill of Rights was widely regarded in 1791 as far more important than the protection it afforded to the individual. Six of the states which ratified the Constitution urged the adoption of numerous amendments before it went into effect.¹⁸ With respect to those proposed amendments, Benjamin F. Wright has noted:

“It has frequently been stated that the motive behind these amendments was a desire to secure greater protection for the natural rights of the people. This is true only in part. An examination of the proposals of the first three States to make them, Massachusetts, South Carolina, and New Hampshire, will afford sufficient evidence of the fact that the members of these conventions were much more disturbed about the rights and powers of the States than about the rights of the people.”¹⁹

Massachusetts proposed nine amendments, but only the sixth, which referred to indictment by grand jury, dealt with individual liberty as such. The short list proposed by South Carolina made mention of “the freedom of the people,” but otherwise dealt with the issue of the “sovereignty of the states,” while of the twelve proposed amendments offered by New Hampshire, only the last three had a direct bearing on individual liberty. Only Virginia and North Carolina, it seems, proposed a true bill of rights for the people.²⁰

Of further significance is the fact that the First Congress, which proposed the Bill of Rights, rejected an attempt to apply portions of it to the states. The fifth resolution of James Madison’s proposed series of amendments for a bill of rights provided that “[n]o State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases.”²¹ But Madison’s suggestion was defeated in the Senate. As Tucker of South Carolina observed:

“This [proposal] is offered as an amendment to the Constitution of the United States, but it goes only to the alteration of the constitutions of particular States. It will be much better, I apprehend, to leave the State Governments to themselves, and not to interfere with them more than we already do; and that is thought by many to be rather too much.”²²

Charles Pinckney, a Framer of the Constitution, later explained the purpose and effect of the Bill of Rights in these striking words:

“When those amendments became a part of the Constitution, it is astonishing how much it reconciled the States to that measure; they considered themselves as secure in those points on which they were the most jealous; they supposed they had placed the hand of their own authority on the rights of religion and the press, and . . . that they could with safety say to themselves: ‘On these subjects we are in future secure; we know what they mean and are at present; and such as they now are, such are they to remain, until altered by the authority of the people themselves—no inferior power can touch them.’”²³

¹⁶ The *Federalist* No. 44, at 323 (J. Madison) (H. Dawson ed. 1964) (emphasis added).

¹⁷ See text accompanying notes 12–15 *supra*.

¹⁸ See B. Wright, *supra* note 12, at 146. See also B. Schwartz, *supra* note 13, at 762–66, 852, 932–33.

¹⁹ See B. Wright, *supra* note 12, at 146.

²⁰ See *id.* at 146–47. For an analysis of the origin and development of the Bill of Rights, as well as the effect of the doctrine of incorporation on the Framers’ view of the Bill of Rights, see J. McClellan, *supra* note 15, at 142–59.

²¹ 1 *Annals of Cong.* 435 (J. Gates ed. 1789).

²² *Id.* at 755.

²³ 10 *Annals of Cong.* 128 (1800).

For nearly a century and a half, the Supreme Court respected these views, thereby securing one of the major objectives of the Bill of Rights. Speaking for a unanimous Court, Chief Justice Marshall declared in *Barron v. Baltimore*²⁴ that the first eight amendments "contain no expression indicating an intention to apply them to the state governments."²⁵ This position was consistently maintained in subsequent decisions involving the first, fourth, fifth, sixth, seventh, and eighth amendments between 1833 and 1868.²⁶ In *Permoli v. New Orleans*,²⁷ for example, a unanimous Court upheld a municipal ordinance challenged by the Catholic Church as a denial of the free exercise of religion, asserting that "[t]he Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the State constitutions and laws."²⁸ And even after the adoption of the fourteenth amendment, which prohibited the states from denying any person life, liberty, and property, the Supreme Court continued to follow and apply *Barron*—a factor strongly supportive of the view that the fourteenth amendment was not intended by those who witnessed its creation and sought to apply its provisions to defeat the original purpose of the Bill of Rights. Throughout the late nineteenth and early twentieth centuries, State and Federal courts uniformly upheld the principle that the Bill of Rights applied only to the Federal Government. "In at least twenty cases between 1877 and 1907," Charles Warren observed, "the Court was required to rule upon this point and to reaffirm Marshall's decision of 1833."²⁹ As late as 1922, in *Prudential Insurance Co. v. Cheek*, the Court declared that "neither the fourteenth amendment nor any other provision of the Constitution imposes restrictions upon the state about freedom of speech."³⁰

The Court suddenly reversed itself in 1925 when it offhandedly remarked in *Gitlow v. New York* that "[f]or present purposes we may and do assume that freedom of speech and press—which are protected by the first amendment from abridgment by Congress—are among the fundamental personal rights and liberties protected by the due process clause of the fourteenth amendment from impairment by the states."³¹ Thus began the piecemeal incorporation of first amendment freedoms into the word "liberty" of the due process clause of the fourteenth amendment, reversing sub silentio and *Barron* decision and thereby undermining one of the great objects of the Bill of Rights—viz., exclusive State jurisdiction and control over the freedoms protected by the first eight amendments. In 1931, in *Near v. Minnesota*,³² the Court embarked upon the revolutionary course outlined in *Gitlow* by incorporating freedom of speech and press into the Fourteenth amendment. In subsequent cases, the Court arbitrarily transferred freedom of assembly³³ and freedom of religion³⁴ into the fourteenth amendment, finally completing the incorporation of the first amendment with the inclusion of the Establishment Clause in *Everson v. Board of Education* in 1947.³⁵ Since 1961 the doctrine of incorporation has been extended to the fourth, fifth, sixth, eighth, and ninth amendments.³⁶ As Charles Fairman has noted, however, "the record of history is overwhelming against" the idea that section 1 of the fourteenth amendment "was intended and understood to impose Amendments I to VIII upon the states . . ."³⁷

Viewed in historical perspective, the *Everson* case was significant in two respects. For the first time, the Supreme Court interpreted the establishment clause as a re-

²⁴ 32 U.S. (7 Pet.) 243 (1833).

²⁵ Id. at 250.

²⁶ See, e.g., *Twitchell v. Pennsylvania*, 74 U.S. (7 Wall.) 321 (1868) (sixth amendment inapplicable to the states); *Pervear v. Massachusetts*, 72 U.S. (5 Wall.) 475 (1867) (eighth amendment applies only to the national government); *Withers v. Buckley*, 61 U.S. (20 How.) 84 (1855) (fifth amendment inapplicable to the states); *Smith v. Maryland*, 59 U.S. (18 How.) 71 (1855) (fourth amendment inapplicable to the states); *Fox v. Ohio*, 46 U.S. (5 How.) 410 (1847) (fifth amendment applies only to the federal government); *Permoli v. New Orleans*, 44 U.S. (3 How 589) (1845) (first amendment not applicable to the states); *Lessee of Livingston v. Moore*, 32 U.S. (7 Pet.) 469 (1833) (seventh amendment inapplicable to the states).

²⁷ 44 U.S. (3 How.) 589 (1845).

²⁸ Id. at 609.

²⁹ C. Warren, "The New 'Liberty' Under the Fourteenth Amendment," 39 Har. L. Rev. 431 (1926).

³⁰ 259 U.S. 530 (1922).

³¹ 268 U.S. 666 (1925).

³² 283 U.S. 697 (1931).

³³ *DeJonge v. Oregon*, 299 U.S. 353 (1937).

³⁴ *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

³⁵ 330 U.S. 1 (1947).

³⁶ Use footnote No. 45 from galley—but omit *In Re Oliver*.

³⁷ C. Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights," 2 Stan. L. Rev. 139 (1949-50).

striction on the *States*. By this bold and fundamental innovation the Court overturned more than a century of constitutional law that had regularly permitted the States to determine church-state relationships in accordance with their own laws and constitutions. Second, and equally novel, was the Court's absolutist theory of religious establishment, holding that the first amendment erected a "wall of separation" between church and state which prohibited a state from giving any aid to and kind—not merely to specific religious sects but to religion generally. It is upon the bases of these pronouncements in *Everson* that the Court subsequently ruled in *Engel v. Vitale*³⁸ that the voluntary recitation of a state-composed school prayer, though nondenominational, constituted an establishment of religion.

The Framers of the Bill of Rights were nevertheless generally inclined toward the view that government had a duty to promote religion and morality in society; and at the time the Bill of Rights was adopted most states actually provided varying degrees of aid to established religions within their jurisdictions.³⁹ The "Wall of separation" rhetoric which appears in a private letter written by Thomas Jefferson,⁴⁰ was not widely accepted even in the nineteenth and early twentieth centuries. On the subject of Bible-reading in the public schools, for example, the State of Massachusetts actually required this practice in 1828; and between 1913-1930, eleven more States enacted similar statutes.⁴¹ Little wonder that Mark de Wolfe Howe has been led to describe the Court's incorporation of the establishment clause and imposition of the "wall of separation" doctrine as a complete "distortion of the intellectual background of the first amendment."⁴²

In response to these developments, the Helms Prayer Bill looks to the restoration of the establishment clause to its original purpose; for its effect would be to lodge in the highest courts of each State final authority over questions involving this one aspect of state aid to religion. Whether the bill succeeds or fails, Senate consideration of its merits will serve to focus public attention on the origin and purpose of both the establishment clause and the Bill of Rights generally, while possibly generating debate on the doctrine of incorporation itself—a public debate that is long overdue and goes to the very heart of the fundamental question of whether it is wise or proper for nine unelected officials, serving for life, to possess the awesome power of deciding what our freedoms shall be. When the Constitution was adopted, the American people were overwhelmingly agreed that liberty is safest when protected at the State and local level. The doctrine of incorporation, which has become the great wellspring of judicial activism in our time, thus runs counter to the basic proposition upon which our nation was founded. Putting aside the issue of whether Congress has the authority under Article III to limit the appellate jurisdiction of the Supreme Court—and return jurisdiction seized by the Court back to the States—an issue which both the Constitution and the Court itself have, in this writer's judgment, answered in the affirmative—the great strength of the Helms Prayer Bill lies in the fact that it promises to stimulate public discussion and debate about the very essence of the American political system.

In another sense, of course, the debate over court regulation under the exceptions clause of article III is one of separation of powers and democratic theory. We live in a democratic republic, based on separation of powers and checks and balances. Without the power to regulate the Court's jurisdiction, particularly when the Court exceeds its authority by creating its own jurisdiction, Congress is helpless to limit the judicial power and the Court is exempted from the checks and balances system—sitting, like a continuous constitutional convention, rewriting the fundamental law. This is not only inconsistent with the basic principle of limited government, but makes judicial review intolerable in a democratic society. Certainly no

³⁸ 370 U.S. 421 (1962).

³⁹ See W. Sweet, *The Story of Religion in America* (1950); S. Cobb, *The Rise of Religious Liberty in America* (1902); I. Cornelison, *The Relation of Religion to Civil Government in the United States of America* (1895).

⁴⁰ The phrase is taken from a letter of Jefferson to the Baptist Association of Danbury, Connecticut, 1802, which reads in part: "I contemplate with sovereign reverence that act of the whole American people, which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between the church and state." As quoted in C. Rice, *The Supreme Court and Public Prayer* 63 (1964).

⁴¹ Pennsylvania, 1913; Delaware and Tennessee, 1915; New Jersey, 1916; Alabama, 1919; Georgia, 1921; Maine, 1923; Kentucky, 1924; Florida and Idaho, 1925; Arkansas, 1930. A. Johnson and F. Yost, *Separation of Church and State in the United States* 33 (1948).

⁴² *The Garden and the Wilderness: Religion and Government in American Constitutional History* 31 (1965). See also E. Corwin, *A Constitution of Powers in a Secular State* (1951); F. O'Brien, *Justice Reed and the First Amendment* (1958).

society can justly call itself democratic where as few as five appointed justices, who are beyond the control of the people and their elected representatives, can determine the meaning and substance of nearly all the freedoms that the people possess. And certainly, no constitution can be said to be based upon a separation of powers or federalism when one of the branches of the national government is free to usurp the functions of the legislature and the powers of the states.

Jurisdiction-limiting bills, like the Helms Prayer Bill, are clearly consistent with the basic principles of separation of powers and federalism. Moreover, these bills represent a return to an allocation of power consistent with the original intent of the Framers, and are essential to protect the rights of the people. At the very least, the American people, speaking through their representatives in Congress, have the right to decide which government and which courts shall protect their liberties. The exceptions clause of article III of the Constitution gives them that right.

Senator DENTON. At this time, the Chair would call forward the first panel of witnesses: Rabbi Seymour Siegel, with the Jewish Theological Seminary of America; John M. Murphy, a gentleman whom I have met and become friends with over the years—Deputy Supreme Knight, Knights of Columbus; and Robert Dugan, Jr., director, National Association of Evangelicals.

I would start from left to right, and ask you, Rabbi Siegel, if you have an opening statement.

STATEMENT OF RABBI SEYMOUR SIEGEL, JEWISH THEOLOGICAL SEMINARY OF AMERICA; JOHN M. MURPHY, DEPUTY SUPREME KNIGHT, KNIGHTS OF COLUMBUS, NEW HAVEN, CONN.; AND ROBERT DUGAN, JR., DIRECTOR, NATIONAL ASSOCIATION OF EVANGELICALS, WASHINGTON, D.C.

Rabbi SIEGEL. Thank you very much, Senator Denton. Taking the lead from Senator Helms, I will start by saying that I do have a prepared statement, which I have already submitted to the record.

My name is Seymour Siegel. I am an ordained rabbi who now serves as professor of ethics and theology at the Jewish Theological Seminary of America in New York City. I have the honor also to be president of the American Jewish Forum, a group of Jewish citizens dedicated to the furtherance of conservative political principles.

I have come here this morning to speak in the name of a tradition which has valued education and religious worship throughout its long history. The Talmudic rabbis, in a famous statement, affirm that the world stands on three things: The learning and practice of the law; the worship and service of God; and on the doing of deeds of kindness to our fellow men. Indeed, the three are intertwined. An education interfused with reverence for the divine will lead human beings to deal kindly with each other.

It is because of this that I appear before you this morning to support the Senate Joint Resolution 199, which is before this committee, and which seeks to restore the freedom of our citizens to offer prayers in public schools.

An educational institution which neglects training in prayer has overlooked an indispensable aspect of human growth and development. It is because of this that, as far as I know, no educational system until relatively recent times—and I think only limited to this country—has not included religious worship as part of its activities or part of its curricula.

There is a long standing tradition of including some form of public prayer in the public schools ever since the inception of the

system in our Nation. The most striking evidence of this is the fact that the Massachusetts Board of Education, then headed by Horace Mann, removed sectarian instruction from the schools but prescribed a program of—and I quote—“daily Bible readings, devotional exercises, and the constant inculcation of the precepts of morality.” Thus the very founder of the American public school system favored the inclusion of religious devotions in the curricula of these institutions.

More and more American parents are being convinced that public schools which are given the task of driver education, sex education, physical education, and family education should also be concerned with the skill so indispensable to human growth—the art and power of prayer.

The public school is the central educational institution of our civilization. It has the awesome responsibility of educating the next generation to carry on the great ideas and structures of the American culture. It cannot, at its peril and ours, neglect to articulate and promote “our supreme principle,” which is a phrase taken from the writings of Martin Buber, probably the greatest Jewish philosopher of our century. I believe that the decisions of the Supreme Court barring religious expression has weakened our public schools as well as our culture. We have, therefore, no recourse except the amendment before us.

What I have said, and what I have written in the record, which you will read later I hope, is the view of many Jewish citizens in our country. However, it would be misleading—and you will certainly hear from others very soon—to deny that the majority of Jewish organizations oppose this amendment. I believe these views to be misguided. They are based on the view that Jews, a small minority of the American people, will be coerced into participating in religious exercises in the framework of religious traditions which they do not accept. Though there is some merit in this apprehension, I believe it is not enough to oppose the intent of the framers of this amendment which is before us for discussion and analysis.

First of all, the proposed amendment expressly denies coercion of anyone to pray. If Jewish parents or atheist or Catholic parents do not wish to permit their children to join in school prayers, they are protected under this amendment. The courts have decided to protect, for example, those students whose religious convictions make it impossible for them to recite the pledge of allegiance. We should and do respect such rights of conscience. We do not, on this basis, prohibit the recitation of the pledge of allegiance in our schools.

We would hope that school boards around the country should be encouraged and assisted in formulating prayers which could be recited by the vast majority of the children and not only those that belong to a certain religious tradition or church or synagogue. And I would hope that the committee encourages local school boards, if this amendment is passed, to use their intelligence and their good will in doing that.

These kinds of prayers should be crafted so as to take into consideration the feelings and beliefs of Jewish school children as well as other minorities in the population. We should recognize that the strengthening of the religious sentiment in our culture is of such

great importance to all of us that the impossibility of some of us, because of reasons of conscience, to participate should not be used as a reason to deny to the others their opportunities to exercise their conscience.

As the Supreme Court has stated, and as quoted frequently here: "We are a religious people whose institutions presuppose a Supreme Being." That, of course, applies to all of us, Protestants, Catholics, and Jews. We should make every effort and attempt to infuse our public institutions with religious sentiment which is common to our various traditions. If we cannot do so, we must realize that solutions will not satisfy everybody, but, in a democratic society, as the great Protestant thinker, Reinhold Niebuhr, pointed out: we try to find provisional solutions to insoluble problems.

And I therefore think that this is a solution to the question of the infusion and the freedom to pray in our public institutions, especially our public schools. And I would therefore urge the passage of this amendment, both to the Senate and the House and to the various States.

Thank you very much, Mr. Chairman.

Senator DENTON. Thank you very much, Rabbi Siegel. Before I go to Mr. Murphy, I note the presence of the senior Senator from Alabama, my friend, Senator Howell Heflin, and would request that if he has an opening statement, he might make it now.

STATEMENT OF SENATOR HOWELL HEFLIN

Senator HEFLIN. Although I don't have a prepared opening statement, I am interested in this issue. It is an issue, I think, that is important to the Nation. From the very beginning, prayer has been an important aspect in the development of this Nation. Most of us know the story about Benjamin Franklin, during the convention held to draft our Constitution. There was a lot of bickering, and the delegates couldn't get anything done. He came forward with the suggestion that each session of the Constitutional Convention be opened with a word of prayer. Following that, in each session it seemed there were more harmonious agreements, working arrangements, and relationships between the Founding Fathers.

I think the key here is that we must have the element of voluntariness, or voluntary prayer. And this is the key, as we study various amendments, various proposals, we must never lose sight of the fact that the word "voluntary" is the keyword, and it has to be interpreted to be truly voluntary.

And I am interested in studying the proposed language, its applications and various scenarios that might develop, in order to see that we do have voluntary prayer, if such proposals or amendments are adopted.

Senator DENTON. Thank you very much, Senator Heflin. We will proceed to Mr. Murphy, the Deputy Supreme Knight, Knights of Columbus, New Haven, Conn.

Mr. MURPHY. Senator Denton, it's a pleasure to be here and see you again. I have submitted a prepared statement, though it's not my own, and I may or may not allude to it specifically in my remarks to this committee. The prepared statement that I have filed is an editorial comment that will appear in the August issue of Co-

lumbia magazine, which is the official organ of the Knights of Columbus, and I can safely say reflects the views of if not all then the vast majority of that organization, which in the United States alone comprises upward of 1 million active members plus their families, their spouses, and children.

It's because we are a family-oriented organization that we are so concerned with this proposed amendment to the Constitution. I share fully Rabbi Siegel's concern, and indeed the concern of some Jews who may not agree with this constitutional amendment, that it might be the opening wedge to imposing on minority groups forms of prayer that would be unacceptable to them.

But I think even a casual reading of the proposed amendment to the Constitution suggests no formal prayer. It simply underlines, underscores, what is implicitly contained in the first amendment to the Constitution, that nothing shall be construed to prohibit individual or group prayer in public schools or other public institutions.

I had my own private thoughts about the wisdom or folly of a court striking down a particular prayer, even though voluntary, that was to be recited in the public school. But I am simply appalled at a decision which says that young people, on their own motion, cannot be permitted to come to a school before it opens in the morning and carry on privately prayer of their own choosing within that group. To me that is an absolutely unfathomable anomaly in the educational system of our country.

Rabbi Siegel pointed out that in his tradition, and I am sure it is the tradition of all rational people, or one that all rational people would subscribe to, that there are three parts to learning: learning the Law, and observing the teaching of God and the things that pertain to God—and He is a reality, whether we believe it or not—and, finally, teaching our young people to carry out good works. I know I have not quoted the rabbi exactly—it's a free paraphrase—but I think it contains the substance of his views.

I share the view of every good American citizen that we ought not to have an establishment of religion. I, too, am a member of a minority, albeit a large one, but if there is one thing I would abhor it is an establishment in this country. Other countries have managed it and managed it nicely; indeed, it may be said that the English and the Canadians have managed it far better than we, where there is an established religion in the form of the Church of England or its counterpart in other possessions of England, and yet they manage to teach the things that pertain to God in their schools and do it quite successfully without violence to the views and sensibilities of minorities.

Mr. Chairman, I heartily support the adoption of this Senate Joint Resolution 199, and can tell you that all of our members will take an active part in seeing to the passage of this amendment.

Thank you very much for your time.

Senator DENTON. Thank you very much, Mr. Murphy. Mr. Dugan is the director of the National Association of Evangelicals, and I invite him to make his statement now.

Mr. DUGAN. Mr. Chairman, thank you very much both for the hearing and for the opportunity for us to testify. I am Robert Dugan of the National Association of Evangelicals. I also have sub-

mitted a written testimony which I would like to have included in the record, where it will be helpful for our time if I limit myself to those comments that are on paper.

Having said that, let me digress for just a second to comment that exactly 2 years ago today I flew to Atlanta to appear on a nationally televised broadcast with Madeline Murray O'Hare to debate the subject of school prayer. Providentially, I believe, I met in the National Airport 3 hours before going on television Bill Murray, who was referred to just a few minutes ago by Senator Helms, and it is quite fascinating to discover who are the friends and the foes of school prayer, as it was that night, with a family even divided between themselves.

On behalf of the National Association of Evangelicals, I want to applaud the President for initiating the effort to restore religious freedoms which have been eroded by the courts. My testimony will, first, focus on the need for a constitutional amendment to return to the original meaning of the first amendment by restoring a balance between the establishment and free exercise clauses; second, support the basic concept of Senate Joint Resolution 199; and, third, offer for the consideration of this committee a suggested change in language to strengthen the proposed amendment.

And, indeed, that last purpose may have anticipated Senator Heflin's express desire to safeguard the voluntary nature of any praying done in our schools.

Americans are generally united on the subject of school prayer. By majorities of about three-fourths, they endorse the concept of voluntary group prayer in the Nation's public schools. Why?

In the *Engel* case, the Supreme Court banned from public schools as unconstitutional both Government-sponsored prayers and the devotional reading of the Bible. If interpreted narrowly, those decisions would not necessarily have proven harmful, but in practice the lower courts and school administrators have carried the spirit of those decisions further than was warranted. Those who categorically oppose prayer in schools have been successful in virtually eradicating any kind of religious reference in many public schools.

Let me cite just a few examples. In the *Lubbock* case, the court held that a school system's permission for students to conduct voluntary meetings for educational, religious, moral, or ethical purposes on school property, before or after regular class hours, violated the establishment clause. In another case, a school district's decision to allow student-initiated prayer at voluntary school assemblies unsupervised by teachers was struck down on establishment clause grounds. And in *Stein v. Oshinsky*, a school principal's order forbidding kindergarten students from saying grace before meals on their own initiative was upheld.

These cases, as well as a host of others, reveal a propensity of the courts to view every form of religious activity solely in establishment clause terms. The President's proposed amendment recognizes the urgent need to return to the original meaning of the first amendment by restoring more of a balance between the establishment and free exercise clauses.

Opponents of the President's initiative have been quick to observe that the responsibility for religious training rests with the home and the church. We couldn't agree more. But their truncated

analysis fails to address the problem of millions of school-age young people who, for lack of any meaningful acknowledgement of God in the public schools, are left to conclude that the State recognizes no power higher than its own. Creation of such an impression is not in keeping with the religious heritage bequeathed us by our Founding Fathers, with long standing national tradition, and with the desire of the great majority of our citizens today.

This committee faces a grave responsibility to respond to the wishes of the American people, who in their inherent wisdom realize the need for a change.

Senate Joint Resolution 199 would constructively amend the Constitution. This amendment steers a wise course by not conferring an affirmative right to prayer in the public schools. It would simply remove any constitutional obstacle to voluntary prayer. In doing so, it would meet the problem we have indicated, the need to shift the focus from the establishment clause to the free exercise clause in order that the public schools be permitted to accommodate the free exercise of religion.

In an effort to live up to the more severe constraints of court-imposed neutrality, our public schools have avoided even acknowledging the existence of God. This public school environment, which in effect makes God irrelevant, is weighted with unspoken values. It subtly makes man the measure of all things—the very definition of secular humanism. The distressing irony is that the Supreme Court has recognized secular humanism as one of the nontheistic religions. If we are to avoid establishing humanism in the public schools, there has to be some opportunity for opposing views to be heard. Today Government neutrality is a myth.

Justice Potter Stewart has proven to be a prophet. As he said in his powerful dissent in the *Abington v. Schempp* case:

[A] compulsory state educational system so structures a child's life that if religious exercises are held to be an impermissible activity in schools, religion is placed at an artificial and state-created disadvantage. Viewed in this light, permission of such exercises for those who want them is necessary if the schools are truly to be neutral in the matter of religion. And a refusal to permit religious exercises thus is seen, not as the realization of state neutrality, but rather as the establishment of a religion of secularism . . .

Opponents of the proposed amendment, in asserting that religion belongs only in the home and church, overlook this reality. The proposed amendment would redress the present lack of neutrality by permitting voluntary prayer in our public schools.

While endorsing the proposed amendment, we would like to submit for the committee's consideration some language we believe would strengthen it. The substance of the changes we suggest is indicated by underscoring in the following version of the amendment:

Nothing in this Constitution shall be construed to prohibit prayer or other religious activity in public schools or other public institutions. Neither the United States nor any State shall require any person to participate in prayer or other religious activity, or influence the form or content of any prayer or other religious activity.

This version of the proposed amendment would expand its scope by permitting a variety of voluntary religious activity—prayer, Bible reading, religious clubs, religious instruction, and so forth. But it would restrict the potential operation of the President's

amendment by prohibiting Government influence on the form or content of any prayer or other religious activity.

Let me elaborate on our reasons for these changes.

The 22-word prayer struck down as a violation of the Establishment clause in the *Engel* case reads as follows: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country."

That kind of prayer, routinely repeated every schoolday, is far removed from the kind of meaningful religious expression that should be permitted in the public schools. Hence, our expansion in the proposed amendment to include "other religious activity."

Our version of the amendment would, first, treat persons of every belief or unbelief equally by prohibiting the Government from influencing the form or content of the religious activity, and, second, overrule *McCollum* to the extent that case was based on the physical location of the program of released time religious instruction in the public schools.

I would like to expand on these two points in terms of *Zorach* and the *McCollum* case.

In *Zorach*, released time programs of religious instruction off the school premises were held constitutional. The only factual difference of any consequence between *Zorach* and *McCollum*, which struck down a released time program of religious instruction in the public schools, is the physical location of the religious instruction. The location of such activity should not be the conclusive determinant of constitutionality. Yet, as interpreted by the Supreme Court, that is the law of the land. It needs to be changed.

The mere physical use of a public school building is not the functional equivalent of State sponsorship or entanglement. Physical proximity does not automatically make church and state one. The use of public school buildings for religious activity should be permitted as an accommodation to the free exercise of religion.

The first amendment does not bar cooperation between church and state. Of course, the State must do no more than cooperate in making its physical facilities available for the religious activity on the same basis as it would for any other activity, including any arrangement for financial reimbursement. Such a lack of entanglement would be constitutionally guaranteed by the language that we suggest be added to the proposed amendment, for it would prohibit the States from influencing the form or content of any prayer or other religious activity.

We have used the word "influence," rather than "prescribe," in order to make it clear that the State cannot, directly or indirectly, have anything to do with the form or content of the religious activity. This would not preclude school authorities from scheduling the school day as they see fit and from assuring that such matters as fire regulations are observed. However, it would permit our public schools, at the discretion of the school authorities, to cooperate with the people of the community in making the school building available for religious activity.

What we propose here today is nothing less than a new birth of freedom in this religiously pluralistic society. Our proposal would assure persons of every faith—as well as those who do not believe—the opportunity to participate in a variety of activity using

the facilities of the public schools. There could be Bible study, prayer, religious instruction, panel presentations, or debates, according to the wishes of the local community.

Students would be free to attend whatever activity they wished. They could go to meetings of their own faith, or attend with friends at sessions of another faith. The appeal of the program, not the influence of the State, would dictate attendance. This is what religious freedom—in truth, academic freedom—is all about. Our approach, to a great extent, reflects the free speech rationale of the Supreme Court in *Widmar*, which held that religious speech is entitled to the same constitutional protection as any other form of speech on a State university campus.

Far from being divisive, such a free and diverse program would promote understanding and tolerance of others' beliefs. That to us would be a far healthier situation than the present state of affairs in the public schools where there is often intolerance of religious belief.

We are encouraged by the potential of a constitutional amendment which would restore a balance between the establishment clause and the free exercise clause. We see no good reason why the States, if they choose, should not be permitted to cooperate with the people in allowing religious expression, uninfluenced by the State, in our public schools. It is time that our public schools ceased to be the only public institution where a meaningful acknowledgement of God is forbidden.

Senator DENTON. Thank you, Mr. Dugan. Before proceeding to questions on the part of the committee members directed to the panel, I would like to note the presence of my friend from Iowa, Senator Charles Grassley, and ask if he cares to make a statement at this time.

Senator GRASSLEY. I would like to wait a few minutes, if I could.

Senator DENTON. Before proceeding to questions, I would, for the record, at this point like to enter into the record the correspondence which the President sent to the Congress regarding his proposed amendment to the Constitution about which this hearing is concerned.

It consists of a covering letter, dated May 21, 1982, signed Elizabeth Hanford Dole, Assistant to the President, in which she forwards the copy of the President's proposed amendment, a legal analysis of the amendment prepared by the Justice Department's Office of Legal Policy, and a set of questions and answers relating to the amendment. There is also a letter from the President himself, also dated May 17, 1982, addressed to the Congress of the United States. In general it announces his proposal for consideration, "a proposed constitutional amendment to restore the simple freedom of our citizens to offer prayer in our public schools and institutions." In it the President expresses his belief that prayer based on our faith in God is a fundamental part of our American heritage and is a privilege which should not be excluded by law from any American school, public or private. The President quotes Alexis de Tocqueville, a quote with which I think most of us in here are familiar, and the Farewell Address quotation from George Washington, also familiar, I am reasonably certain, to most of us in this room, but it is only three sentences that he quotes—I think I

should at least read those. Our first President said, in his Farewell Address:

Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. . . . And let us with caution indulge the supposition that morality can be maintained without religion. . . . Reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.

The President goes on to record that nearly every President since Washington has proclaimed a day of public prayer and thanksgiving to acknowledge the many favors of Almighty God. He notes that our coinage, our national anthem, and our pledge of allegiance acknowledge the Supreme Being. He establishes evidence that the founders of our Nation and the framers of the first amendment did not intend to forbid public prayer, quotes Benjamin Franklin, the quotation to which I believe Senator Heflin alluded, and emphasizes that in this amendment, which removes the bar to school prayer established by the Supreme Court, emphasizes also the amendment expressly affirms the right of anyone to refrain from prayer, and says that the amendment will allow communities to determine for themselves whether prayer should be permitted in their public schools, and to allow individuals to decide for themselves whether they wish to participate in prayer.

The joint resolution itself is then included, the usual preamble or presentation of a constitutional amendment, then the two sentences which I have previously quoted which constitute the amendment, and then the administration's proposed constitutional amendment relating to school prayer with a table of contents, including six parts—the religious heritage of the Nation, tradition of prayer in the public schools, the religion clauses of the first amendment and public prayer, judicial rulings restricting school prayer, the need for a constitutional amendment, and analysis of the proposed amendment, which in turn is broken down into five parts.

If there is no objection, I direct that this be included in the record.

[Material referred to by Senator Denton follows:]

THE WHITE HOUSE
WASHINGTON

May 21, 1982

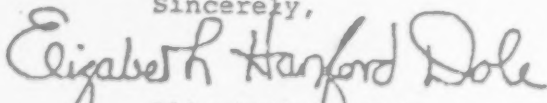
On May 17, the President sent to the Congress his proposed amendment to the Constitution which would restore the freedom of our citizens to offer prayer in our public schools and institutions.

I have enclosed for your information the following items:

1. A copy of the President's proposed amendment.
2. A legal analysis of the amendment prepared by the Justice Department's Office of Legal Policy.
3. A set of questions and answers relating to the amendment.

I hope you will find this information helpful in articulating the President's proposals and objectives on this very important issue.

Sincerely,



Elizabeth H. Dole
Assistant to the President
for Public Liaison

TO THE CONGRESS OF THE UNITED STATES:

I have attached for your consideration a proposed constitutional amendment to restore the simple freedom of our citizens to offer prayer in our public schools and institutions. The public expression through prayer of our faith in God is a fundamental part of our American heritage and a privilege which should not be excluded by law from any American school, public or private.

One hundred fifty years ago, Alexis de Tocqueville found that all Americans believed that religious faith was indispensable to the maintenance of their republican institutions. 1 de Tocqueville, Democracy in America 316 (Vintage ed. 1945). Today, I join with the people of this nation in acknowledging this basic truth, that our liberty springs from and depends upon an abiding faith in God. This has been clear from the time of George Washington, who stated in his farewell address:

Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. . . . And let us with caution indulge the supposition that morality can be maintained without religion. . . . (R)eason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.

35 The Writings of George Washington 229 (J. Fitzpatrick ed. 1940).

Nearly every President since Washington has proclaimed a day of public prayer and thanksgiving to acknowledge the many favors of Almighty God. We have acknowledged God's

guidance on our coinage, in our national anthem, and in the Pledge of Allegiance. As the Supreme Court has stated: "We are a religious people whose institutions presuppose a Supreme Being." Zorach v. Clauson, 343 U.S. 306, 313 (1952).

The founders of our nation and the framers of the First Amendment did not intend to forbid public prayer. On the contrary, prayer has been part of our public assemblies since Benjamin Franklin's eloquent request that prayer be observed by the Constitutional Convention:

I have lived, Sir, a long time, and the longer I live, the more convincing proofs I see of this truth -- that God governs in the affairs of men. . . . I also believe that without his concurring aid we shall succeed in this political building no better than the Builders of Babel: We shall be divided by our little partial local interests; our projects will be confounded, and we ourselves shall become a reproach and bye word down to future ages. . . .

I therefore beg leave to move -- that henceforth prayers imploring the assistance of Heaven, and its blessings on our deliberations, be held in this Assembly every morning before we proceed to business. . . .

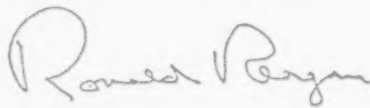
1 The Records of the Federal Convention of 1787, 451-52 (M. Farrand ed. 1966).

Just as Benjamin Franklin believed it was beneficial for the Constitutional Convention to begin each day's work with a prayer, I believe that it would be beneficial for our children to have an opportunity to begin each school day in the same manner. Since the law has been construed

to prohibit this, I believe that the law should be changed. It is time for the people, through their Congress and the state legislatures, to act, using the means afforded them by the Constitution.

The amendment I propose will remove the bar to school prayer established by the Supreme Court and allow prayer back in our schools. However, the amendment also expressly affirms the right of anyone to refrain from prayer. The amendment will allow communities to determine for themselves whether prayer should be permitted in their public schools and to allow individuals to decide for themselves whether they wish to participate in prayer.

I am confident that such an amendment will be quickly adopted, for the vast majority of our people believe there is a need for prayer in our public schools and institutions. I look forward to working with Congress to achieve the passage of this amendment.

A handwritten signature in dark ink, reading "Ronald Reagan". The signature is written in a cursive, flowing style with a large initial "R".

THE WHITE HOUSE,
May 17, 1982.

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is hereby proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution if ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress:

"ARTICLE ____

"Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any State to participate in prayer."

THE ADMINISTRATION'S PROPOSED
CONSTITUTIONAL AMENDMENT
RELATING TO
SCHOOL PRAYER

I. THE RELIGIOUS HERITAGE OF THE NATION

From the birth of the United States, public prayer and the acknowledgment of a Supreme Being have been a foundation of American life. Government officials have continually invoked the name of God, asked His blessings upon our nation, and encouraged our people to do the same. One of the most striking examples of this invocation of God's blessing and assistance is found in the Declaration of Independence, which proclaims it "self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights. . . ." The new nation was established, the authors of the Declaration said, "appealing to the Supreme Judge of the world for the rectitude of our intentions" and "with a firm reliance on the Protection of Divine Providence. . . ."

Similarly, the First Congress, which drafted the language of the First Amendment, not only retained a chaplain to offer public prayers, but, the day after proposing the First Amendment, called on President Washington to proclaim "a day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts, the many

signal favors of Almighty God." 1/ Nearly every President since Washington (including Lincoln, both Roosevelts and Kennedy) has proclaimed a national day of prayer and thanksgiving. 2/ The First Congress also amended and continued in effect the Northwest Ordinance of 1787, the original text of which provided in part: "[r]eligion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Act of Aug. 7, 1789, 1 Stat. 50, 51-52 n.(a).

In his Farewell Address, President Washington urged: "[L]et us with caution indulge the supposition, that morality can be maintained without religion. . . . Reason and experience both forbid us to expect that National morality can prevail in exclusion of religious principle." 3/ Thomas Jefferson wrote: "And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God?" 4/

1/ Rice, The Prayer Amendment: A Justification, 24 S. C. L. Rev. 705, 715 (1972).

2/ 3 Stokes, Church and State in the United States 180-93 (1950).

3/ 35 The Writings of George Washington 229 (J. Fitzpatrick ed. 1940).

4/ W. Berns, The First Amendment and the Future of American Democracy 13-14 (1976).

Coins have borne the legend "In God We Trust" since 1865, 31 U.S.C. § 324a, 5/ and this was made the national motto in 1956. 36 U.S.C. § 186. In 1952, Congress directed the President to proclaim a National Day of Prayer. 36 U.S.C. § 169h. In 1954, Congress added the words "under God" to the Pledge of Allegiance to acknowledge this heritage. 36 U.S.C. § 172. The House Judiciary Committee explained:

This is not an act establishing a religion or one interfering with the "free exercise" of religion. A distinction must be made between the existence of a religion as an institution and a belief in the sovereignty of God. The phrase "under God" recognizes only the guidance of God in our national affairs. 6/

Many patriotic songs similarly acknowledge dependence upon God and invoke His blessings. One stanza from the National Anthem, 36 U.S.C. § 170, includes the phrases "Praise the Pow'r that hath made and preserved us a nation" and "And this be our motto, 'In God is our Trust.'" 7/ The fourth stanza of "America" reads:

5/ Engel v. Vitale, 370 U.S. 421, 449 (1962) (Stewart, J., dissenting).

6/ H.R. Rep. No. 1693, 83d Cong., 2d Sess. (1954).

7/ Engel v. Vitale, 370 U.S. at 449 (Stewart, J., dissenting).

- 4 -

Our fathers' God, to Thee, Author of Liberty,
to Thee we sing.
Long may our Land be bright with freedom's holy
light,
Protect us by Thy might, Great God our King. 8/

Most recently, the House of Representatives adopted a resolution, by a 388-0 vote, reaffirming its practice of retaining a chaplain to begin its sessions with prayer. 9/

These examples only confirm the tradition of publicly declaring and encouraging a belief in and dependence upon God. As the Supreme Court has stated: "We are a religious people whose institutions presuppose a Supreme Being." Zorach v. Clauson, 343 U.S. 306, 313 (1952). 10/

8/ Note, Religion and the Public Schools, 20 Vand. L. Rev. 1078, 1094 n.89 (1967). Before Engel v. Vitale, 370 U.S. 421 (1962), the New York City public school students recited this verse each day. Id.

9/ 126 Cong. Rec. H1168-73 (daily ed. March 30, 1982).

10/ The Court's statement in Zorach was simply one example of the long tradition of judicial acknowledgment of our religious heritage. The cases are replete with other examples. See, e.g., Holy Trinity Church v. United States, 143 U.S. 457, 465 (1892):

[N]o purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people. This is historically true. From the discovery of this continent to the present hour, there is a single voice making this affirmation.

II. TRADITION OF PRAYER IN THE PUBLIC SCHOOLS

In keeping with the nation's heritage of public prayer, there has been a long tradition of including some form of prayer in the public schools ever since their inception. ^{11/} As early as 1789, for example, the Boston school committee required schoolmasters "daily to commence the duties of their office by prayer and reading a portion of the Sacred Scriptures." ^{12/} A commission supporting the establishment of a public school system in New York in 1812 reported that "Morality and religion are the foundation of all that is truly great and good, and are consequently of primary importance." ^{13/} There was a considerable effort in the 19th century to avoid the use of "sectarian books and sectarian instruction." ^{14/} For example, the Massachusetts Board of Education headed by Horace Mann removed sectarian instruction from the schools but also prescribed a program of "daily Bible readings, devotional

^{11/} See generally, L. Pfeffer, Church, State, and Freedom, 394-99 (1953); Beale, A History of Freedom of Teaching in American Schools 95 (1941); Note, supra note 8, at 1083-84.

^{12/} Hartford, Moral Values in Public Education: Lessons from the Kentucky Experience 31 (1958).

^{13/} 2 State of New York, Messages from the Governors (C. Lincoln ed.) 550-51.

^{14/} 2 Stokes, supra note 2, at 57, quoted in Brief of Intervenor-Respondents at 25, Engel v. Vitale, 370 U.S. 421 (1962).

exercises and the constant inculcation of the precepts of Christian morality." 15/ Thus, the requirement of nonsectarian instruction generally was not thought to preclude prayer or Bible readings without comment in the schools. 16/ Many states had allowed the recitation of nonsectarian prayers or Bible verses in public schools, as long as participation was not compelled. 17/

Prayer in the schools was, in many cases, patterned closely on public prayer in other contexts. For example, in Engel v. Vitale, 370 U.S. 421, 422 (1962), the school prayer

15/ Id. See also L. Pfeffer, supra note 11, at 284-86.

16/ In 1876, the nonsectarian movement led to consideration of the so-called Blaine amendment in Congress, which would have imposed nonsectarian requirements on the states. In particular, the Senate version of the amendment would have forbidden the teaching of the "particular creed or tenets" of any religious group in the public schools, but it expressly stated that it would not prohibit "the reading of the Bible in any school or institution." 4 Cong. Rec. 5453 (1876). The House passed a version of the Blaine amendment, but the Senate version fell short of a two-thirds vote in the Senate. Id. at 5595. The amendment was defeated in part because of the belief that existing state constitutions were adequate to restrict sectarian instruction and in part because of partisan differences. See L. Pfeffer, supra note 11, at 131-32; Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 218 (1948) (opinion of Frankfurter, J.).

17/ See Abington School District v. Schempp, 374 U.S. 203, 277 nn. 52&53 (1963) (Brennan, J., concurring) (citing cases and source materials).

prepared by the New York State Board of Regents (the Regents' prayer) read:

Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.

The Regents, in their brief to the Supreme Court as amicus curiae, noted that the exact words "Almighty God" were contained in 34 state constitutions, that every state constitution acknowledged dependence on God in some form, and that an acknowledgment or invocation of "blessings" was contained in 29 state constitutions. 18/ Thus, the recitation of the Regents' prayer in New York schools closely mirrored other official statements reflecting the nation's religious heritage.

III. THE RELIGION CLAUSES OF THE FIRST AMENDMENT AND PUBLIC PRAYER

The First Amendment to the Constitution, which was proposed by the First Congress in 1789, provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . . " In a 1947 decision, the Supreme Court construed the Establishment Clause to be applicable to the states through the due process clause of the Fourteenth Amendment. 19/

In concluding that the First Amendment forbids prayer in public schools, many courts and commentators have

18/ Brief at 15-16.

19/ Everson v. Board of Education, 330 U.S. 1 (1947).
See also Cantwell v. Connecticut, 310 U.S. 296 (1940) (Free Exercise Clause).

relied heavily upon James Madison's statement of his views on church and state in his Memorial and Remonstrance Against Religious Assessment. 20/ This document was written four years before the First Amendment was proposed, in opposition to a general tax for the support of religious education in Virginia. Considerable reliance has also been placed on Jefferson's assertion, made thirteen years after the Amendment was drafted, that the Establishment Clause was intended to erect "a wall of separation between church and State," 21/ although, as Justice Stewart has noted, that "phrase [is] nowhere to be found in the Constitution." 22/ Jefferson's statement, while a "powerful way of summarizing the effect of the First Amendment," was "clearly neither a complete statement nor a substitute for the words of the Amendment itself." 23/ Moreover, Jefferson's own subsequent writings, which reflect his belief that nonsectarian

20/ 2 Writings of James Madison 183-91, reprinted in Everson v. Board of Education, 330 U.S. 1, 63-72 (1947) (Appendix to opinion of Rutledge, J., dissenting). The Supreme Court in Everson and Engel v. Vitale quoted the views of Madison in interpreting the religion clauses of the First Amendment. See Everson, 330 U.S. at 11-13 (opinion of the Court); id. at 37 (Rutledge, J., dissenting); Engel v. Vitale, 370 U.S. at 436.

21/ Everson v. Board of Education, 330 U.S. at 16. This phrase is drawn from a statement by Jefferson, dated January 1, 1802, to the Danbury Baptist Association. The full text appears at 16 Writings of Thomas Jefferson 281-82 (Lipscomb and Bergh, eds. 1903).

22/ Engel v. Vitale, 370 U.S. at 445-46 (Stewart, J., dissenting).

23/ Griswold, Absolute is in the Dark -- A Discussion of the Approach of the Supreme Court to Constitutional Questions, 8 Utah L. Rev. 167, 174 (1963).

religious exercises should not be totally excluded from public education, belie the absolute effect which some have sought to give these words. 24/

The Supreme Court, in holding prayer in public schools to be unconstitutional, embraced an absolutist interpretation of the First Amendment based on its reading of the historical context in which the Amendment was passed. 25/ The Court in Engel v. Vitale, 370 U.S. at 428-29 n.11, relies on the interpretation of history contained in Everson v. Board of Education, 330 U.S. at 11-13 (opinion of the Court), and 33-42 (Rutledge, J., dissenting). Justice Rutledge said:

No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment. . . . In the documents of the times, particularly of Madison, . . . is to be found irrefutable confirmation of the Amendment's sweeping content. . . . [Madison's] Remonstrance is at once the most concise and the most accurate statement of the views of the First Amendment's author concerning what is "an establishment of religion." . . . [I]t behooves us in the dimming distance of time not to lose sight of what he and his coworkers had in mind when, by a single sweeping stroke of the pen, they forbade an establishment of religion and secured its free exercise. 330 U.S. at 33-34, 37-38.

24/ See Griswold, *supra* note 23, at 174; R. Healey, Jefferson on Religion in Public Education 256 (1962).

25/ 370 U.S. at 425-30.

Thus, it is appropriate to examine the record of the First Congress, which proposed the First Amendment, in order to determine what was intended, and whether Justice Rutledge's assessment is correct.

Because Madison introduced the First Amendment in Congress, the Court appears to assume that the final product reflects only his personal views. While the personal views of the sponsor of any legislation may be accorded deference in analyzing congressional intent, one cannot ignore the plain language that emerged and the contribution of other members of Congress to the legislation. Madison's proposal was substantially amended in committee before it was considered by the whole House. ^{26/} When House floor debate began, the proposal read as follows: "No religion shall be established by law nor shall the equal rights of conscience be infringed." ^{27/}

This language prompted concern among some representatives that the amendment would prevent nondiscriminatory state aid to religion. One voiced a fear that such language "might be thought to have a tendency to abolish

^{26/} As introduced, Madison's proposal read: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." 1 Annals of Congress 434 (1789).

^{27/} Id. at 729.

- 11 -

religion altogether." 28/ Another thought that it should read "no religious doctrine shall be established by law." 29/ Another agreed

that the words might be taken in such latitude as to be extremely hurtful to the cause of religion He hoped, therefore, the amendment would be made in such a way as to secure the rights of conscience, and a free exercise of the rights of religion, but not to patronize those who professed no religion at all. 30/

Madison explained his position by saying that

he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience

Mr. Madison thought if the word 'national' was inserted before religion, it would satisfy the minds of honorable gentlemen. He believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform. He thought if the word 'national' was introduced, it would point the amendment directly to the object it was intended to prevent. 31/

These passages from the congressional debates prove two points. First, the concern the Congress wished to address by the amendment was the fear that the federal government might establish a national church, use its influence to prefer certain sects over others, or require

28/ Id.

29/ Id. at 730.

30/ Id. at 730-31.

31/ Id.

or compel persons to worship in a manner contrary to their conscience. Second, in addressing that concern, Congress did not want to act in a manner that would be harmful to religion generally or would defer to the small minority who held no religion.

The version approved by the House read, "Congress shall make no law establishing religion, or to prevent the free exercise thereof or to infringe the rights of conscience." 32/ The Senate specified more narrowly the scope of the clause: "Congress shall make no law establishing articles of faith, or a mode of worship, or prohibiting the free exercise of religion." 33/

The final version of the First Amendment contained the language "respecting an establishment of religion." The Supreme Court has given the word "respecting" a broad interpretation. 34/ It has forbidden not only a direct establishment of religion but also any act accommodated or even tolerated by state auspices that might encourage religious faith. 35/ It is doubtful, however, that the Congress intended such result. Moreover, in view of the objections raised during the debates that the states should

32/ Id. at 766.

33/ 2 B. Schwartz, The Bill of Rights: A Documentary History 1153 (1971).

34/ See Engel v. Vitale, 370 U.S. at 428 n.11.

35/ Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

not be precluded from aiding religion, it is more likely that the final language was intended to prevent Congress from passing a law interfering with the existing state laws on the establishment of religion. 36/

Prior to its decisions of the 1960's, the Supreme Court had recognized that the Establishment Clause was not intended to result in absolute separation:

The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other -- hostile, suspicious, and even unfriendly. 37/

As stated by Justice Stewart, "as a matter of history and as a matter of the imperatives of our free society, . . . religion and government must necessarily interact in countless ways." 38/

36/ Malbin, Religion and Politics 15-17 (1978); Berns, supra note 4, at 8-9; Sky, The Establishment Clause, the Congress and the Schools: An Historical Perspective, 52 Va. L. Rev. 1395, 1418-19 (1966). Thus, as Justice Stewart has noted, "it is not without irony that a constitutional provision evidently designed to leave the States free to go their own way should now have become a restriction upon their autonomy." Abington School District v. Schempp, 374 U.S. at 310 (Stewart, J., dissenting).

37/ Zorach v. Clauson, 343 U.S. 306, 312 (1952). The Court went on to suggest that prayers in legislative halls, thanksgiving proclamations, and "all other references to the Almighty that run through our laws, our public rituals, [and] our ceremonies" do not "flout . . . the First Amendment." Id. at 312-13.

38/ Abington School District v. Schempp, 374 U.S. at 309 (Stewart, J., dissenting).

Thus, the foregoing discussion supports the conclusion that the First Amendment was not intended to preclude a reference to or reliance upon God by public officials in prayer, as distinguished from government "establishment" of a particular sect. ^{39/} This interpretation of the language of the First Amendment is further supported by the fact that the same Congress that passed the First Amendment also retained a chaplain and called for a day of prayer and thanksgiving to God. ^{40/}

IV. JUDICIAL RULINGS RESTRICTING SCHOOL PRAYER

In 1962 and 1963, the Supreme Court decided two cases that held it is an impermissible "establishment of religion" in violation of the First Amendment for a state to foster group prayer or Bible readings by students in the public schools. In Engel v. Vitale, 370 U.S. 421 (1962), the Supreme Court forbade the recitation of the New York State Regents' prayer in New York public schools. The Court ruled that "government in this country, be it state or federal, is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity." 370 U.S. at 430. Although it was

^{39/} See Bérns, supra note 4, at 68-72; Rice, supra note 1, at 709-16.

^{40/} See text at 1-2, supra.

- 15 -

clear that students were not required to participate in the prayer, the Court appeared to adopt a theory of implied coercion:

When the power, prestige and financial support of the government is placed behind a particular religious belief, the coercive pressure upon religious minorities to conform to the officially approved religion is plain. Id. at 431.

One year later, in Abington School District v. Schempp, 374 U.S. 203 (1963), the Court struck down a Pennsylvania law requiring that public schools begin each day with readings, without comment, from the Bible. Emphasizing the "complete and unequivocal" separation between church and state in its previous constructions of the First Amendment, 41/ the Court concluded that the purpose and primary effect of Pennsylvania's law was the advancement of religion in violation of the Establishment Clause.

374 U.S. at 222-26.

In construing the Establishment Clause to require strict "neutrality" of the state toward religion, the Court has forbidden the government from placing any support "behind the tenets of one or of all orthodoxies." Id. at 222. The Court also reaffirmed the rule that

Neither [the states nor the federal government] can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid

41/ 374 U.S. at 219-20, quoting Zorach v. Clauson, 343 U.S. 306, 312 (1952). See also Everson v. Board of Education, 330 U.S. at 18.

those religions based on a belief in God as against those religions founded on different beliefs. 42/

The prohibition against favoring religion as against non-believers or favoring theistic religions as against nontheistic religions would appear to preclude any action by the states or the federal government affirming a belief in God.

The Court in Schempp rejected the view that religious practices may be defended as being in aid of legitimate secular purposes, and concluded that the provisions to excuse students from participation also provided, under its view of the Establishment Clause, no defense. 374 U.S. at 224-25. In short, any "religious exercises . . . required by the States," even though "relatively minor encroachments" on the Court's concept of neutrality, are to be forbidden. Id. at 225.

In the years following Engel v. Vitale and Abington School District v. Schempp, the courts have increasingly restricted the states from incorporating religious observances into the daily schedule of students in public schools. In one case, for example, a school principal's order forbidding kindergarten students from saying grace before meals on their own initiative was upheld. 43/ In

42/ 374 U.S. at 220, quoting Torcaso v. Watkins, 367 U.S. 488, 495 (1961).

43/ Stein v. Oshinsky, 348 F.2d 999 (2d Cir.), cert. denied, 382 U.S. 957 (1965).

another case, the recitation of a similar verse before meals, but without any reference to God, was held to be a prayer in violation of the Establishment Clause. 44/

More recently, the Supreme Court affirmed a lower court decision striking down a school board policy of permitting students, upon request and with their parents' consent, to participate in a one-minute prayer or meditation at the start of the school day. 45/ The lower court found that the practice of permitting student and teacher prayers in the public schools was inconsistent with the "absolute governmental neutrality" demanded by the Supreme Court's interpretation of the First Amendment. 653 F.2d at 901. The Supreme Court has also held that a state statute requiring the posting of the Ten Commandments on classroom walls in public schools was unconstitutional. Stone v. Graham, 449 U.S. 39 (1980).

The principles established in Engel v. Vitale and Abington School District v. Schempp have been extended recently to bar the accommodation or even toleration of students' desire to pray on school property even outside regular class hours. In one case, a court held that a

44/ DeSpain v. DeKalb County Community School Dist., 384 F.2d 836 (7th Cir. 1967), cert. denied, 390 U.S. 906 (1968).

45/ Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981), aff'd mem., 102 S. Ct. 1267 (1982). Accord, Kent v. Commissioner of Education, 402 N.E.2d 1340 (Mass. 1980).

school system's decision to permit students to conduct voluntary meetings for "educational, religious, moral, or ethical purposes" on school property before or after class hours violated the Establishment Clause. 46/ Similarly, a state court forbade the reading of prayers from the Congressional Record in a high school gymnasium before the beginning of school. 47/ In another case, a school district's decision to allow student initiated prayer at voluntary school assemblies that were not supervised by teachers was deemed a violation of the Establishment Clause. 48/ In each case, the court found no difference of constitutional dimension between the practice of permitting students to engage in individual or group prayer on public property and the active organization of prayer or readings

46/ Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F.2d 1038, 1042-48 (5th Cir. 1982); see also Brandon v. Board of Education, 633 F.2d 971, 977-79 (2d Cir. 1980), cert. denied, 102 S. Ct. 970 (1981); Trietley v. Board of Education, 65 A.D.2d 1, 409 N.Y.S.2d 912 (1978).

47/ State Board of Education v. Board of Education, 108 N.J. Super. 564, 262 A.2d 21, aff'd, 57 N.J. 172, 270 A.2d 412 (1970), cert. denied, 401 U.S. 1013 (1971).

48/ Collins v. Chandler Unified School Dist., 644 F.2d 759 (9th Cir.), cert. denied, 102 S. Ct. 322 (1981).

from the Bible by school authorities, as in Engel v. Vitale and Abington School District v. Schempp. 49/

Finally, with respect to prayer in public buildings other than schools, the Court of Appeals for the District of Columbia Circuit has ruled that atheists have standing to challenge the practice of the Senate and House of Representatives retaining Chaplains to open their sessions with a prayer, although the court has not yet decided whether the practice is unconstitutional. Murray v. Buchanan, No. 81-1301 (D.C. Cir. Mar. 9, 1982). Another court has ruled unconstitutional a state legislature's practice of retaining any particular chaplain to open legislative sessions with prayer. 50/

49/ Id. at 761; Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F.2d at 1042-43; Brandon v. Board of Education, 635 F.2d at 978-79. The recent Supreme Court decision in Widmar v. Vincent, 102 S. Ct. 269 (1981), does not retreat from these principles. In that case, the Court held that a state university may not, consistent with the First Amendment's guarantee of free speech, exclude a student religious group from utilizing university facilities for meetings where those facilities were generally open for use by student groups. As the court pointed out, the question at issue in Widmar "is not whether the creation of a religious forum would violate the Establishment Clause." Id. at 276. Instead, given that the university opened its facilities to general student use, "the question is whether it can now exclude groups because of the content of their speech." Id. In this context, the Court did not believe that the primary effect of the open facilities policy would be to advance religion. Id.

50/ Chambers v. Marsh, No. 81-1077 (8th Cir. Apr. 14, 1982). But see Zorach v. Clauson, 343 U.S. at 312-13 (suggesting that "[p]rayers in our legislative halls" do not "flout[] the First Amendment").

V. THE NEED FOR A CONSTITUTIONAL AMENDMENT

The Supreme Court's decisions that state-composed prayer and Bible reading constitute an "establishment" of religion do not give adequate regard to our religious heritage and misinterpret the historical background of the First Amendment. The Establishment Clause was not intended to prohibit governmental references to or affirmations of belief in God. 51/ As Justice Story concluded, "[a]n attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation" at the time the First Amendment was drafted. 52/ Thus, the history of the Establishment Clause and Free Exercise Clause do not support the Supreme Court's conclusion that public prayer in schools is unconstitutional. As stated by Erwin N. Griswold, former Dean of Harvard Law School and former Solicitor General of the United States: "These are great provisions, of great sweep and basic importance. But to say that they require that all traces of religion be kept out of any sort of public activity is sheer invention." 53/

51/ See text at 7-14 supra. See also T. Cooley, General Principles of Constitutional Law of the United States, 224-25 (3d ed. 1898); 3 J. Story, Commentaries on the Constitution of the United States, § 1868 (1833).

52/ J. Story, supra note 51, § 1868.

53/ Griswold, supra note 23, at 174.

Moreover, the courts have extended the principles of Engel v. Vitale and Abington School District v. Schempp to proscribe not only government-sponsored prayer, but also voluntary prayer initiated by students. By prohibiting students' voluntary prayers before meals, periods of meditation before class, and student prayer meetings in school buildings outside of class hours, the courts' concern with the Establishment Clause has overshadowed the First Amendment right of students to free exercise of religion. As Justice Stewart has stated, "there is involved in these cases a substantial free exercise claim on the part of those who affirmatively desire to have their children's school day open with the reading of passages from the Bible." 54/ Although it can be argued that those parents could send their children to private or parochial schools, the Supreme Court has stated that "[f]reedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way." 55/

The unintended but inevitable result of current judicial interpretations of the Establishment Clause is not state neutrality but a complete exclusion of religion which, as Justice Stewart noted, is, in effect, state discouragement of religion:

54/ Abington School District v. Schempp, 374 U.S. at 312 (Stewart J., dissenting).

55/ Id. at 312-13, quoting Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943).

For a compulsory state educational system so structures a child's life that if religious exercises are held to be an impermissible activity in schools, religion is placed at an artificial and state-created disadvantage. Viewed in this light, permission of such exercises for those who want them is necessary if the schools are truly to be neutral in the matter of religion. And a refusal to permit religious exercises thus is seen, not as the realization of state neutrality, but rather as the establishment of a religion of secularism, or at least as government support of the beliefs of those who think that religious exercises should be conducted only in private. 56/

Commentators have noted that the government neutrality between theistic and non-theistic beliefs that the Supreme Court has sought to achieve is, indeed, unachievable:

The fallacy of the Supreme Court's "neutrality" concept is that it is impossible for the government to maintain neutrality as between theistic and non-theistic religions without implicitly establishing an agnostic position. Agnosticism, however, is a non-theistic belief. The choice, then, is not, as the Court and its apologists have said, between "neutrality" and government encouragement of theism. The choice is between government encouragement of theism and government encouragement of agnosticism. 57/

A constitutional amendment allowing school prayer is needed not only because it is consistent with and more accurately reflects the original intent of the First Amendment than the current judicial interpretations, but also because it would allow religious and educational

56/ Abington School District v. Schempp, 374 U.S. at 313 (Stewart, J., dissenting).

57/ Rice, supra note 1, at 714. See also People ex rel. Vollmar v. Stanley, 255 P. 610, 616 (Colo. 1927).

decisions of essentially local concern to be made by states and localities rather than the federal judiciary. For over 170 years, school prayer issues were resolved at the state and local levels by the residents of the affected communities. Their choices regarding school prayer reflected the desires and beliefs of the parents and children who were directly and substantially affected.

Finally, and most importantly, this amendment is needed because the free expression of prayer is of such fundamental importance to our citizenry that it should not be proscribed from public places. ^{58/} Prayer in the public schools has long been considered a desirable and proper means of imparting constructive moral and social values to schoolchildren, while generally encouraging in them a practice of self-reflection and meditation. ^{59/} Conversely, the exclusion of prayer from the daily routine of students could convey the misguided message that religion is not of high importance in our society. A prayer such as the one struck down in Engel v. Vitale, for instance, was promoted by the New York State Regents to encourage children to take

^{58/} Polls have shown that public approval of voluntary school prayer ranges from 69 to 85 percent of the population. See New York Times, May 7, 1982, p. B 40. Such clear public sentiment in favor of school prayer supports the need for this constitutional amendment.

^{59/} For example, the brief Bible readings in Abington School District v. Schempp were designed to serve such secular purposes as "the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions, and the teaching of literature." Id., 374 U.S. at 223.

a moment to think of their blessings and the good fortune for which they should be thankful. 60/ Introducing children to such a practice can benefit the children and the public good.

VI. ANALYSIS OF THE PROPOSED AMENDMENT

The proposed constitutional amendment is essentially intended to restore the status quo with respect to the law governing prayer in public schools that existed before Engel v. Vitale and Abington School District v. Schempp were decided; i.e., when prayers such as the Regents' prayer and readings from the Bible without comment were not thought to be unconstitutional. However, the proposed amendment affirms the fundamental right of every person to reject any religious belief, as he or she deems fit, and not participate in the expression of any religious belief.

A. Elimination of the Prohibition Against Prayer

The proposed amendment provides that "Nothing in this Constitution shall be construed to prohibit individual or group prayer. . . ." This language is intended to overrule Engel v. Vitale, which forbade the reading of brief

60/ See "The Regents Statement on Moral and Spiritual Training in the Schools" (Nov. 30, 1951), Appendix A to Brief for Board of Regents as Amicus Curiae, Engel v. Vitale, 370 U.S. 421 (1962).

state-composed prayers, and Abington School District v. Schempp, which forbade readings from the Bible. The proposed amendment would, therefore, make clear that the Establishment Clause of the First Amendment could no longer be construed to prohibit the government's encouragement or facilitation of individual or group prayer in public schools, and that students should be allowed to participate in such prayer with the support of school authorities.

The language of the proposed amendment would also foreclose an argument that the Free Exercise Clause of the First Amendment could be construed to forbid group prayer. Thus, the amendment rejects the "implied coercion" theory advanced in Engel v. Vitale, 370 U.S. at 431, which presumes that any group prayer by consenting students has a coercive effect upon the objecting students in violation of their right to free exercise of religion, and that therefore no prayer is constitutionally permissible. ^{61/} However, as discussed below, the proposed amendment expressly protects the right of objecting students not to participate in prayer. This provision is sufficient to protect the rights of those who do not wish to participate without denying to all others who desire to pray an opportunity to do so.

^{61/} See also Abington School District v. Schempp, 374 U.S. at 288 (Brennan, J., concurring).

B. Availability of Prayer

The intent of the proposed amendment is to leave the decisions regarding prayer to the state or local school authorities and to the individuals themselves, who may choose whether they wish to participate. The proposed amendment would not require school authorities to conduct or lead prayer, but would permit them to do so if desired. Group prayers could be led by teachers or students. Alternatively, if the school authorities decided not to conduct a group prayer, they would be free to accommodate the students' interest in individual or group prayer by permitting, for example, prayer meetings outside of class hours or student-initiated prayer at appropriate, nondisruptive times, such as a brief prayer at the start of class or grace before meals. School authorities could, of course, develop reasonable regulations governing the periods of prayer, in order to maintain proper school discipline.

The language of the proposed amendment would remove the prohibition on prayer imposed by judicial construction of the First Amendment, but is not intended to create a new, affirmative constitutional right to prayer. The source of a right to prayer is found in the First Amendment's guarantees of free exercise of religion and freedom of speech, although most courts considering the question have rather narrowly construed the Free Exercise Clause as applicable only in the case of an "inexorable

conflict with deeply held religious beliefs." 62/ The proposed amendment would not, by its terms, alter past constructions of the Free Exercise Clause or the Free Speech Clause as a source of a right to prayer. Of course, to the extent that a right of prayer could be based on the Free Exercise Clause or the Free Speech Clause, the right would remain subject to reasonable state restrictions governing the time, place, and manner of its expression. 63/

C. Type of Prayer

If school authorities choose to lead a group prayer, the selection of the particular prayer -- subject of course to the right of those not wishing to participate not to do so -- would be left to the judgment of local communities, based on a consideration of such factors as

62/ See Brandon v. Board of Education, 635 F.2d at 977-80; Stein v. Oshinsky, 348 F.2d at 999-1002; Hunt v. Board of Education, 321 F. Supp. 1263 (S.D. W.Va. 1971); Kent v. Commissioner of Education, *supra*.

63/ See, e.g., Stein v. Oshinsky, 224 F. Supp. 757, 760 (E.D.N.Y. 1963) ("The rights of [students] to say voluntary prayer must be subject to such reasonable rules and regulations as may be prescribed by the school authorities"), *rev'd on other grounds*, 348 F.2d 999 (2d Cir.), *cert. denied*, 382 U.S. 957 (1965). *Cf.* Heffron v. International Society for Krishna Consciousness, 101 S. Ct. 2559 (1981) (restriction on distribution of religious literature upheld); Grayned v. City of Rockford, 408 U.S. 104 (1972) (restriction on demonstration near school upheld). Thus, school officials would be able to schedule periods of prayer in a manner so as not to cause disruptions during the school day; similarly, a judge or legislative committee could limit prayer to the opening of a day's session, not during the middle of a jury argument or a hearing.

the desires of parents, students and teachers and other community interests consistent with applicable state law. The amendment does not limit the types of prayer that are constitutionally permissible and is not intended to afford a basis for intervention by federal courts to determine whether or not particular prayers are appropriate for individuals or groups to recite.

The proposed amendment also does not specifically limit prayer in public schools and other public institutions to "nondenominational prayer." A limitation to "nondenominational prayer" might well be construed by the federal courts to rule out virtually any prayer except one practically devoid of religious content. Because of the Supreme Court's current construction of the Establishment Clause, 64/ any reference to God or a Supreme Being could be viewed as "denominational" from the perspective of a non-theistic sect. 65/ Readings from the Bible and other identifiably Judeo-Christian sources similarly might be excluded as "denominational." 66/

64/ See Abington School District v. Schempp, 374 U.S. at 220; Engel v. Vitale 370 U.S. at 430-33.

65/ Such non-theistic religions might include "Buddhism, Taoism, Ethical Culture, Secular Humanism, and others." Torcaso v. Watkins, 367 U.S. at 495 n.11. One court has construed Transcendental Meditation as a "constitutionally protected religion." Malnak v. Yogi, 592 F.2d 197, 214 (3d Cir. 1979).

66/ See Abington School District v. Schempp, 374 U.S. at 282 (Brennan, J., concurring) (asserting that "any version of the Bible is inherently sectarian").

Moreover, a limitation to "nondenominational prayer" would not only preclude arguably sectarian prayer that may be promoted by the state but also would prevent individuals or groups, acting on their own and with no encouragement from the state, from participating in sectarian prayer in public places. The amendment is intended to enable the state to allow voluntary, privately-initiated prayer in public places, such as saying grace before meals or attending an informal prayer meeting before or after school. ^{67/} It would clearly be inappropriate to constitutionally limit such privately-initiated prayer to "nondenominational" expression.

The determination of the appropriate type of prayer is a decision which should properly be made by state and local authorities. That was indeed the practice throughout most of this nation's history. In fact, the long history of prayer in public schools has produced a considerable body of state court decisions, decided before Engel v. Vitale and Abington School District v. Schempp, which clarify the scope of permissible prayers under state law. Because the proposed amendment merely would remove the bar of the Establishment Clause as construed by the Supreme Court, state laws which prohibit or restrict sectarian

^{67/} Cf. Stein v. Oshinsky, 348 F.2d 971 (grace before meals); Brandon v. Board of Education, 635 F.2d 999 (prayer meeting before school).

instruction in public schools would not be affected. For example, a number of state courts construed state constitutions or laws to prohibit sectarian instruction but not to prohibit readings from the Bible without comment or other brief devotional exercises. ^{68/} In a few states, state courts ruled against prayer in public schools, ^{69/} and those decisions would not be affected by the proposed amendment. In other areas, the state and local authorities would be left to determine the appropriate rules for prayer in light of current conditions. Thus, the proposed amendment is not intended to establish a uniform national rule on prayer, but to allow the diversity of state and local approaches to manifest themselves free of federal constitutional constraints.

The national heritage of prayer in the public schools and elsewhere suggests the types of prayer that might be followed in particular areas. Prayers could be based upon established religious sources, such as the

^{68/} See Abington School District v. Schempp, 374 U.S. at 277 n.52 (Brennan, J., concurring) (citing cases in Colorado, Florida, Georgia, Iowa, Kentucky, Kansas, Michigan, Minnesota, New Jersey, New York, Tennessee and Texas). The Appendix to the Brief for Appellants in Abington School District v. Schempp summarized 25 state laws or constitutional provisions which were construed to permit readings from the Bible. These laws are consistent with the experience of many states which, although removing sectarian instruction from the schools, nevertheless permitted readings from the Bible. See text supra at 6.

^{69/} See Abington School District v. Schempp, 374 U.S. at 275 n.51 (Brennan, J., concurring) (citing cases from Illinois, Louisiana, Nebraska, South Dakota, Washington State, and Wisconsin).

Bible, 70/ or could be suggested by school authorities in light of local circumstances. Examples of such prayers composed or selected by school officials are the Regents' prayer in Engel v. Vitale, and the fourth verse from "America," which was recited by New York City school-children. 71/

D. Applicability of the Proposed Amendment

The amendment by its terms would apply to prayer in "public schools or other public institutions." The intent of this language is to make the remedial provisions of this amendment coextensive with the reach of the First Amendment's Establishment Clause as construed by the Supreme Court. The prohibitions of the Establishment Clause do not forbid prayer in private schools or institutions, and so the present amendment need not address the issue.

Although most controversies relating to public prayer arise in the context of public schools, the proposed amendment is drafted to apply to prayer in other public institutions, including prayers in legislatures. 72/ In

70/ In Abington School District v. Schempp, 374 U.S. at 207, 211, the school authorities permitted the use of different versions of the Bible.

71/ See note 8 supra.

72/ One court has ruled unconstitutional a state legislature's practice of retaining a chaplain to offer prayers, and a similar challenge to chaplains in Congress is pending. See text at 19 supra.

such public institutions, prayer could be permitted to the extent and under the conditions determined by the authorities in charge.

E. No Person Can Be Required to Participate in Prayer

The second sentence of the proposed amendment guarantees that no person shall be required to participate in prayer. This prohibition assures that the decision to participate in prayer in public schools and other public institutions will be made without compulsion. Those persons who do not wish to participate in prayer may sit quietly, occupy themselves with other matters, or leave the room. Reasonable accommodation of this right not to participate in prayer must be made by the school or other public authorities. Thus, the exercise of the right to refrain from participating cannot be penalized or burdened.

The proposed amendment does not refer to "voluntary" prayer, but incorporates the concept of voluntariness into the second sentence, which assures that students or others will not be required to participate in prayer if they do not wish to do so. One reason for this formulation is to make clear that the amendment rejects the "implied coercion" theory of Engel v. Vitale, 370 U.S. at 431. The term "voluntary prayer" might, moreover, be read to refer only to student-initiated prayer. The amendment is intended to include more than this. Public authorities should have the right to conduct public prayers for those

who desire to participate, subject only to the express right of those who do not wish to participate not to do so.

The guarantee against required participation in prayer parallels and reaffirms the protection already afforded by the Free Exercise Clause of the First Amendment. 73/ It is intended to be analogous to the Supreme Court's decision in West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943), which held that students cannot be compelled to recite the Pledge of Allegiance. 74/ Thus, the second sentence of the proposed amendment assures that students and others will never have to make a forced choice between their religious beliefs and participation in a state-sponsored prayer. Indeed, the second sentence of the proposed amendment provides greater protection than the Free Exercise Clause, because a person desiring not to participate in prayer need not show a

73/ See McDaniel v. Paty, 435 U.S. 618 (1978) (state statute barring ministers from service in state legislature violates right to free exercise of religion); Wisconsin v. Yoder, 406 U.S. 205 (1972) (state compulsory school attendance law violates free exercise rights of Amish parents); Sherbert v. Verner, 374 U.S. 398 (1963) (conditioning unemployment benefits on acceptance of Saturday work violates free exercise rights of a Seventh-Day Adventist).

74/ See also Torcaso v. Watkins, 367 U.S. 488 (1961) (state law requiring affirmation of belief in God as a condition to public employment violates free exercise rights).

religious basis for his belief. 75/ Accordingly, there would be no need for an inquiry into the religious basis for a person's decision not to participate in prayer.

The fact that one or more students do not wish to participate in prayer, however, would not mean that none of the students would be allowed to pray. The provision forbidding required participation in prayer is intended to be sufficient to protect the interests of those students. As the Supreme Court stated in West Virginia State Board of Education v. Barnette, 319 U.S. at 630, with respect to the Pledge of Allegiance, "the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so." This would be the proper rule to apply with respect to school prayer: persons who do not wish to participate in prayer should be excused or may remain silent, but that should not interfere with or deny the rights of others who do wish to participate.

75/ A person relying only on the right to free exercise of religion must show a fundamental conflict between religious convictions and state-imposed obligations, but, even so, the state may justify an infringement upon religious liberty by showing that it is "essential to accomplish an overriding government interest." United States v. Lee, 102 S. Ct. 1051, 1055 (1982), citing, Thomas v. Review Bd. of Indiana Employment Sec., 101 S. Ct. 1425 (1981); Wisconsin v. Yoder, 406 U.S. 205 (1972); Gillette v. United States, 401 U.S. 437 (1971); Sherbert v. Verner, 374 U.S. 398 (1963). In Lee, the Court did not dispute that mandatory payment of social security taxes violates Amish religious beliefs. 102 S. Ct. at 1055. The Court nonetheless found that the overriding public interest in a strong social security system justifies this burden on religious beliefs, and that the imposition of such a burden did not violate free exercise rights. Id. at 1056-57.

THE WHITE HOUSE

WASHINGTON

May 6, 1982

QUESTIONS AND ANSWERS ON THE PRESIDENT'S PROPOSED
VOLUNTARY SCHOOL PRAYER AMENDMENT

Q) Will the amendment overrule, abolish, or modify the First Amendment to the Constitution?

A) No. The voluntary school prayer amendment will be consistent with the original purpose of the First Amendment, which was to enhance the opportunities of citizens to worship as they see fit. For 170 years after the adoption of the First Amendment, prayer was permitted in the public schools. In 1962, the Supreme Court held that prayer in the public schools violated the First Amendment provision forbidding an "establishment of religion".

Justice Potter Stewart, in a strong dissent from the Court's opinion, pointed out that the purpose of the Establishment Clause was to prevent the Federal Government from establishing an official religion. Justice Stewart pointed out that permitting school children to participate voluntarily in prayer is a far cry from designating a particular religion to which citizens must subscribe. He pointed out that the two Houses of Congress open their daily sessions with prayers, that our coins, our Pledge of Allegiance, and our National Anthem all reflect the truth that "we are a religious people whose institutions presuppose a Supreme Being." *Engel v. Vitale*, 370 U. S. 421 (1962) (Stewart, J., dissenting).

Q) How will the amendment guarantee that nobody will be coerced into participating in prayer or religious exercise?

A) The amendment will guarantee that no person shall be required by the United States or by any state to participate in prayer. Lower federal court decisions have suggested, for instance, that prayers by unofficial groups of students who congregate after class hours of their own volition are not really voluntary because other students might feel subtle pressure to join in the prayer. The amendment will reject such an approach.

Q) What is to prevent school districts from imposing particular religious doctrines on school children?

A) The amendment will rely on two factors to guard against the imposition of sectarian beliefs:

First, the American political tradition is one of respect for diversity and for freedom of religious expression. It would be wrong to assume that states and localities would seek to stifle diversity or to offend members of their communities who hold minority religious views. In fact, prior to 1962, local school authorities demonstrated a respect both for religion and diverse views about religion.

Second, the amendment will absolutely forbid public schools or other government agencies from requiring anyone to participate in any prayer or religious exercise. Anyone who is offended by the content of any prayer -- whether he is a member of a minority religious group, an atheist, or anyone else -- can simply refuse to participate; this constitutional right of refusal will be an absolute safeguard against the imposition of sectarian forms of worship.

The Lord's Prayer and the Ten Commandments are reflections of our Judaeo-Christian heritage that could not fairly be described as instruments for the imposition of narrow sectarian dogmas on school children. Indeed, any reference to a "personal" God who is more than a mere "life-force" might be "denominational" insofar as it reflected the general beliefs of Judaism and Christianity to the exclusion of those who reject the idea of a personal God.

Q) Will the amendment affect other public institutions besides public schools?

A) Yes but this provision would effect little or no change in present judicial interpretations of the First Amendment. As Justice Stewart pointed out in his dissent in Engel v. Vitale, prayer is an important part of our national heritage and of our daily community life. Prayer in public places other than schools -- in public parks, in prisons, in hospitals, in legislatures, in Presidential Inaugural Addresses -- has never been held to violate the Constitution. The United States Supreme Court begins all its sessions with reference to Almighty God. The amendment would reaffirm this interpretation, subject to the right of every individual to refuse to participate in prayer or religious exercise.

Q) Would the amendment have any intended effect on pending court actions against prayers in sessions of Congress and against the retention of chaplains in the armed services?

A) The amendment would reaffirm the constitutionality of prayers in Congress and of armed service chaplains.

Q) Will the amendment have any effect on the question of government aid to religious schools, or "tuition tax credits"?

A) No. Judges and constitutional scholars hold a wide range of opinions on the extent to which government may directly or indirectly aid religious institutions. The amendment will deal only with public institutions and would not affect the constitutional status of private institutions.

Q) Will the amendment require school boards or other government agencies to permit students to pray in school?

A) No. The amendment will simply remove any constitutional obstacle to voluntary prayer. If school boards decided that such prayers were a bad idea, they would be exactly as free to exclude prayer from the schools as they are now. But states and local school boards would also be free to permit voluntary prayer, a power that is now denied them.

Q) Will state governments or local school boards be free to compose their own prayers if this amendment is ratified?

A) Yes. Since the voluntary school prayer amendment will eliminate any federal constitutional obstacle to voluntary school prayer, states and communities would be free to select prayers of their own choosing. They could choose prayers that have already been written, or they could compose their own prayers. If groups of people are to be permitted to pray, someone must have the power to determine the content of such prayers.

The amendment will accept the premise that communities are a more appropriate forum than federal courts for decisions about the content of school prayers. Of course, no student or any other individual will be required to participate in any prayer to which he objected for any reason.

Q) Why are you proposing a constitutional amendment rather than statutory changes to restore the right to prayer in schools and public institutions?

A) Legislative enactments will not be sufficient to overcome Supreme Court interpretations of constitutional provisions. Proposals to limit Supreme Court jurisdiction, even if constitutional, would not reverse existing Supreme Court decisions and would be inappropriate as a matter of policy.

Q) What is the status of support in the Congress and in the states for restoring voluntary school prayer?

A) A wealth of national poll data shows overwhelming public support for restoring voluntary school prayer. In the 97th Congress, there are now pending thirteen bills and nine proposed constitutional amendments designed to restore the opportunity for voluntary school prayer.

State legislatures have repeatedly tried to restore this right to their public school children.

Senator DENTON. We will direct some questions to the panel. I have only four.

I will ask each or any of you to answer this question, again starting on my left, with Rabbi Siegel.

Some opponents of school prayer cite Thomas Jefferson's concept—I might say the alleged concept of Thomas Jefferson, although he used the words—of “the wall of separation between church and state”—opponents cite that as justification for prohibiting common prayers in schools.

Would you care to comment—since you favor prayer in schools, what is wrong, then, with that argument?

Rabbi SIEGEL. Well, you said, Senator, that the phrase “separation of church and state” does not appear in the Constitution itself, and I think appears only in a letter that Jefferson wrote to somebody, and in reality, as is pointed out, I think, by one of the Senators here, the alleged separation of church and state wall is more like a hedge, I guess—well, he didn't say that, I'm saying it—it's more like a hedge, you can just cross whenever you want to. And all public institutions, as one of our witnesses said, all public governmental institutions of the United States of America start with or include prayer. If I can just take a second for a personal reminiscence, in 1973 I was honored by an invitation from the President of the United States to deliver a prayer at his inauguration, and after I finished reciting that prayer, I returned to my seat, and I was seated behind the Supreme Court, and right in front of me was—now deceased—one of the great upholders of a more literalistic interpretation of the establishment clause. And I tapped him on the shoulder, and I said, “How come you allowed me to do that?” And he sort of smiled and said, “You know, just wait.”

We have chaplains in the Army, we have chaplains in Federal hospitals, in Federal prisons, unfortunately, and the wall of separation of church and state, as pointed out I think also in the course of our discussions, refers to the establishment of any particular religion, which we are not permitted to do, and which the Founding Fathers wisely, on the basis of their experience in the British Isles and other places, wanted to avoid having here in this country.

So I don't see anything wrong in a kind of religious exercise which doesn't favor any particular religion, and certainly which is voluntary and therefore not imposed by the United States.

Senator DENTON. Thank you, Rabbi Siegel. Mr. Murphy?

Mr. MURPHY. Senator Denton, I simply take the view that there is no wall of separation between church and state. Jefferson may have said it—I don't happen to know for a certainty. I was relieved of some unease when you said he is alleged to have said it. Whoever may have said it, if he said it, was mistaken. What unfortunately has happened is that the courts of this land have repeated it, and they indulge in a kind of judicial legislation in grafting something onto the first amendment that never was there and, in my judgment, is not there now. The result of these legal pronouncements is that we have to have this Senate Joint Resolution 199 to counter something they have grafted erroneously on the Constitution over the years.

Senator DENTON. Thank you, sir. Mr. Dugan?

Mr. DUGAN. Mr. Chairman, I guess perhaps evangelicals are in the best position to identify Thomas Jefferson's phrase, for it was written to a Baptist association, and that is in our ball park.

It seems to me that the Founding Fathers did not intend to separate God from government. Whatever "separation of church and state" means, it did not imply what I have just indicated. In fact, Chief Justice Burger said that the metaphor, the wall of separation, really does not contribute to rational analysis of such issues, and I think it is an obfuscating kind of reference; it is an important one historically to us, but I think it is one of the most misunderstood phrases in this Nation today.

Senator DENTON. I believe that there is rationale in the President's support for this proposed constitutional amendment, to establish that although Jefferson once used the words "wall of separation" between church and state, that it would be irrational to believe that this was his standard because of other remarks Jefferson made before and after that. I won't bore the assemblage with what he said about that, but I believe the case certainly has been made here which would have to be refuted before I personally would believe that, the "wall of separation" was Thomas Jefferson's or our Constitution's standard. That is what I meant by "alleged," the concept is what I think is alleged, not whether or not he actually used the words once, "wall of separation between church and state."

Senator Grassley, are you prepared at this?

Senator GRASSLEY. I would like to ask questions before I go through my statement, so I won't hold up the panel if they desire to leave.

Mr. Dugan, on page 2 of your prepared testimony, you state in the second paragraph:

If interpreted narrowly, those decisions would not necessarily have proven harmful, but in practice the lower courts and school administrators have carried the spirit of those decisions further than was warranted.

I would like to have you elaborate on that. Also, in conjunction with Senator Hatfield's testimony, do you believe there may be an opportunity for legislative initiatives as opposed to constitutional amendment initiatives to correct the situation created by the interpretation of the *Engel* decision by the lower Federal courts.

Mr. DUGAN. Senator Grassley, the *Engel* decision, as I understand it, ruled out a State-mandated prayer, and we quote that particular prayer later on in this paper, and it seems to me that the interpretation by lower courts has moved beyond that to rule out even voluntary prayers, that is, prayers not composed by State authorities as a lowest common denominator kind of acceptable-to-all-people prayer, a prayer, in effect, to whom it may concern.

And school administrators, frankly, have run scared; they are afraid for their jobs, they are afraid that if they get their school district into a lawsuit of some sort, and it costs great funds and results in increased taxes, they have lost their position. And so they are reluctant to allow anything that smacks of religiosity into schools. And thus it has come to be, however, over these couple of decades, the common interpretation that no praying is to be done in the schools, though all of us, I think, know of exceptions. Some-

body can say, but my sister teaches in Tennessee and they have prayer every day in the schools, and maybe they do in some places where the local desire would not allow any parent to rise up and sue to remove such praying.

As far as Senator Hatfield's desire to have legislative initiatives is concerned, we concur with him as far as he went, because he was talking about legislative initiatives that would create a *Widmar* kind of decision for the lower schools, that is, the elementary and secondary schools of the Nation. The Supreme Court did not extend that decision to the public school system; they limited it only to the university and college campuses, and we go along with Senator Hatfield and think that it is important to allow voluntary gatherings by children, let's say, before school begins without faculty or administration there, just using the rooms in order to have a Bible study or a time of prayer together, and so on.

Senator Hatfield was not in favor of allowing prayer in the schools, and thus I don't think any legislative initiative would be successful in accomplishing that, short of this constitutional amendment.

At least, in the prior Congress, the one legislative initiative that got anywhere, that proposed by Senator Helms, which would withdraw jurisdiction from the Federal courts, was unsuccessful on the House side, though the Senate did pass it.

Senator GRASSLEY. Do you believe that there is a real distinction between prayers led by school officials and those prayers offered spontaneously by students?

Mr. DUGAN. We think the distinction is between those prayers which are stipulated by State authorities, and offered by whoever. And I am not sure where I would come down on the question of whether a prayer ought to be offered by a teacher, if it were done on a voluntary basis, in the same sense that it might be offered by a student.

Senator GRASSLEY. Three or four years ago, my children were going to one of the suburb's school systems of the Washington area, and one of the teachers of that school system asked me to come and swear in the new class officers that spring for the following year—they have a ceremony of inauguration. I was a Member of the House of Representatives then. I accepted the opportunity, because I think I have a responsibility to help people appreciate participatory democracy to any extent that I can. I went to the school to do that, and it took about an hour, I suppose, not only the swearing in, but the singing of the Star-Spangled Banner and all of the other things that go on in a ceremony like that. I got there and the teacher asked if I would open with prayer, and if I would close with prayer. I did that.

Did I violate the Constitution? Did the teacher violate the Constitution by asking me to do that?

Mr. DUGAN. Senator, I am neither a lawyer nor a Supreme Court Justice, but in my humble opinion you did not.

Senator GRASSLEY. Can any of the other panelists give their opinion of whether or not I or the teacher violated the Constitution? Did the school system violate the Constitution? Were the constitutional rights of the students violated?

Mr. MURPHY. I would share Mr. Dugan's humble opinion. You were asked to do it; you did it, I presume, voluntarily; you weren't there as a paid representative of the U.S. Government, you were there as a parent of one of the children; you were acting as any other citizen, or any other concerned parent, and you chose of your own free will to say a prayer at the opening and closing of this. The happenstance that you were also a Representative in the Congress I don't think alters the situation in the context in which you describe it.

Rabbi SIEGEL. I would concur, until somebody brings a lawsuit. [Laughter.]

I mean, I would say that it didn't violate anything, as far as I can tell. You never know what can happen as a result of a lawsuit.

Senator GRASSLEY. So I can't take any satisfaction in the fact that I stood up to the Supreme Court?

Rabbi SIEGEL. Not yet, because you haven't.

Senator GRASSLEY. Do you believe that the rationale used by the Court in the case of *Widmar v. Vincent* might be applied to secondary school situations as well as college campuses?

Mr. DUGAN. We certainly do, Senator, in fact refer to that. In the *Widmar* case the Court never did address the issue of free exercise of religion which we have used in our argument here, but only the matter of free speech, and in that case we are associating ourselves with the comments of Senator Hatfield earlier, who is making the case for free speech as part of academic freedom in terms of the opportunity for students of religious persuasion to study religion and even to practice it, though not under the sponsorship of schools, and his urging that we clear away legislatively the barriers to that sort of thing.

Senator GRASSLEY. Mr. Chairman, I don't have any further questions.

Senator DENTON. Thank you, Senator Grassley. I have another question. Opponents of school prayer are worried that this constitutional amendment will enable States to draft prescribed prayers, and there are other bills pending which might have such a result, so I would ask you each, Should the States be able to draft official prayers which would be offensive to minorities? Please keep in mind that all of the literature, all of the judicial analyses on this subject, including that which is set forth in the President's message on this, are scrupulously aware of the danger and the unsuitability of a sectarian-type prayer being adopted.

Would you care to address that, Rabbi Siegel? Should the States be able to draft official prayers?

Rabbi SIEGEL. I mention that in my testimony. That is a very great worry. I have no worry at all about having prayers in the public schools; I have worries about not having them. I have a great worry about what the prayers will be exactly, which has to do with beliefs and traditions.

I think I am right in saying that if the State were to prescribe the text of a prayer, it would come very close to establishing a religion, which is prohibited by the first amendment of the Constitution. This proposed amendment does not attempt to annul the first amendment. Therefore I think the State authorities would be relegated to an advisory kind of thing, to advise various school offi-

cials, what would be a good way in which the intent of this amendment could be carried out so as to least offend people who may be of minority religious persuasion or of no religious persuasion.

And, as I said again, I am not exactly sure how that is going to be except in my experience people of good will and willingness to understand other people frequently are able to come up with things that people who are experts can't or don't.

Senator DENTON. Before going to Mr. Murphy, I would want to emphasize that on page after page, all of the materials I have seen on this subject emphasize the undesirability of State-authored prayers. Moreover it was the specific intent of the authors of the first amendment with its prohibitions with respect to establishment of a religion to avoid excessive Government entanglement with religion. And I think if this amendment is passed, or at least voted on, the various States will be aware, if they are not yet aware, of the insistence on the part of all involved to avoid just that.

It may be interesting to read, or relevant to read, the respective House and Senate versions of the first amendment as it was originally considered by the Congress in order to further the understanding that a State-authored prayer may be too specific with respect to a given sect, and thus effectively serve to promote the establishment of a religion.

Rabbi SIEGEL. I think the analogy, sir, was mentioned by Senator Thurmond of having a chaplain opening the Senate with prayer. You don't tell the Chaplain what to say—I don't know if you tell him what not to say, that may be a secret—but I don't think you tell him what to say. You make it possible for a chaplain to pray without establishing exactly what he is to pray.

Senator DENTON. Yes; in that regard, the same Congress which passed the first amendment, insisted on having chaplains and agreed upon the designation of a national day of prayer and thanksgiving to Almighty God. Accordingly there is reason to believe that the framers did not hold that prayer in public institutions was forbidden.

Mr. Murphy, how would you address that question, should the States be able to draft official prayers?

Mr. MURPHY. I would say "no" as the short opening answer, Mr. Chairman. The State should not be permitted or enabled even to draft official public prayers, but the State should be able—and I think this amendment, and indeed the first amendment, would allow that prayer be said in public places, and, as the Rabbi pointed out, in many official openings prayers are said not by a functionary of the State, but by a priest or a rabbi or a minister of religion who is invited there probably by a speaker or a president of the assembly, whatever it may be, but this is only a kind of deference or courtesy to that individual. He might defer to anybody else. Presiding judges, in opening their courts at the beginning of term, invite a clergyman, usually of the judge's own faith, but not necessarily, to come and say a prayer.

And my own experience in that has been that all in the courtroom or any other public places stand and reverently listen to whatever clergyman is up there praying to Almighty God. There is only one thing that came to my mind in terms of official public

prayer. In the great State of Connecticut, at the closing of the general assembly, the last words—and I believe it's a formula, because I have never heard it deviated from—the secretary of the state closes the assembly with the words: God save the State of Connecticut. I take that to be a formal prayer, but one to which I am sure no one would object, though it appears to be an official formula.

Beyond that, I would certainly not want the Government to go. My initial answer, after that long harangue, is, "No, the State should not be allowed to formulate official prayers."

Senator DENTON. To make sure that we are addressing the full point, and recognizing the possible ambiguity of the question, should the State be able to draft "official prayers" I wonder if your negative response would extend to the situations in which States would be free to adopt a version of a voluntary prayer which would be suitable within the State and be subject to appeal only to the State supreme court?

Mr. MURPHY. I think, as a fellow religionist, you know, others in the country who believe there is a God, I would at least tolerate a kind of uniform prayer, but I have heard the expression used here, and I share the expression, the acceptance of it, "watered-down versions." I know this would be next to impossible to accomplish, unless we keep in mind the voluntary character of prayer, and this amendment underscores the voluntary nature of it.

My personal view is I would far rather hear the marvelous diversity of prayer and liturgy that all of the religions in this country can bring to public functions. I think I would rather from time to time listen to, on one occasion, a Jewish rabbi, on another a Roman Catholic priest, on another an Anglican, a Greek, and so on, to show ourselves what a wonderful combination of cultures we have in this country. I don't believe in a melting pot theory, incidentally; I believe that all of our cultures should be preserved and perfected and not watered down even to a common prayer that would perhaps be meaningless—would please nobody because it tried to please everybody.

Senator DENTON. Although that was the subject of a Supreme Court ruling, it is not necessarily the thrust of the amendment, and while we were here earlier I in my own mind touched upon that principle and wondered whether we would find a consensus of agreement in the United States that instead of a standard prayer in any State there may be a set of prayers which reflect the diversity and also the mutuality of respect, the commonality of belief in a God and the importance of our continued reliance upon Him.

Mr. MURPHY. If such a prayer could be found, I would be very happy to say it.

Senator DENTON. Yes, it certainly will be a very careful process by which we consider all this.

Mr. Dugan?

Mr. DUGAN. Mr. Chairman, at this point we associate ourselves with probably the chief reservation of those who are opposed to prayer, namely, that States would design and mandate a particular prayer, and thus far at least I am the only witness who has suggested any amending of the President's proposed constitutional amendment, and in our particular amendment the most significant part of it, I think, is this statement, that neither the United States

nor any State shall influence the form or content of any prayer or other religious activity.

So we concur with that great concern, because you have kind of an establishment if even one of the 50 States determines what is an acceptable prayer in a school. We feel that the State should not either directly or indirectly affect the content of any religious expression under the free-exercise-of-religion clause of the first amendment. And we are as concerned about the rights of minorities as anyone else.

What I foresee, should this amendment pass with the kind of safeguard that we have, is a great diversity of practice in this country. In some areas there would be no praying in the schools whatever; in some, prayer might be limited to an annual graduation service with the local minister invited in to pray God's blessings upon the graduates as they go out; in some there might be prayer every day in schools; in others there might be prayer in certain specified assemblies. But they would be according to the wishes of the local communities; that would be where the control and where the permission would be granted according to the wishes of those individual communities.

Senator DENTON. Thank you, Mr. Dugan, and we are in possession of your proposed changes, and I see that you would extend "voluntary prayer" by including "other religious activity," and would add "or influence the form or content of any prayer or other religious activity."

I am not disposed one way or another on an example which we have by virtue of a recent legislative decision on the part of the State which I represent, Alabama, and I am now for the first time reading this prayer as an example of one that might be developed by a State, and without wishing to prejudice their view of it, I would be interested in your reaction to it.

It says:

An Act, to provide for a prayer that may be given in public schools and educational institutions of this state, be it enacted by the legislature of Alabama * * *.

The act consists of section 1 and section 2.

Section 1. From henceforth, any teacher or professor in any public educational institution within the State of Alabama, recognizing that the Lord God is one, at the beginning of any home room or any class, may pray, may lead willing students in prayer, or may lead the willing students in the following prayer to God: * * *

And this prayer is in quotes:

Almighty God, you alone are our God, we acknowledge you as the Creator and Supreme Judge of the world. May your justice, your truth, and your peace abound this day in the hearts of our countrymen, in the councils of our government, in the sanctity of our homes, and in the classrooms of our schools, in the name of our Lord, amen.

That's the prayer quoted. And section 2 says:

This Act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming law.

Now, I believe that has been approved by the Governor, and I wonder if it constitutes at this time an offense to those of you who have expressed objection to the States formulating a proposed prayer.

Rabbi SIEGEL. Yes, I think that that prayer, as you read it out to us, does illustrate the weaknesses of these State-prescribed prayers, which my distinguished colleagues here and your distinguished colleagues have expressed. Religion in general is like love in general—it's nice to sing about, but it's only meaningful when it's something particular, somebody particular, that is the object of it.

And it's impossible to be religious in general; you have to be religious in a specific way—Christian, Jewish, Muslim, Buddhist, whatever it is. And although there are many common elements, to erase all the specific elements does, as somebody here said, water down the prayers to such a degree that there is not very much left.

This is even an example of a watering down which is not even a watering down, because the last phrase, "in the name of our Lord," or "the Lord," could be—in fact, I think is—not offensive, but objectionable to Jews, because it is obviously an echo of the proper Christian formula which Christians should use, as I think Jesus instructed Christians to pray in his name. Even though it doesn't mention the name of Jesus, it does imply that, or at least have the echo of the traditional Christian formula, because otherwise, if you are praying, you are obviously praying in the name of God.

So that the prayer that you mentioned is first of all an example of a watering down which I think takes away the power of the individual child's identity with his own religious tradition, which I think should be at least encouraged in the public school and other public institutions, and does that even unsuccessfully, although I am sure unknowingly, I am sure inadvertently.

Senator DENTON. Well, if there is any efficacy to the argument that in effect we are establishing, by virtue of ruling out any mention of God in any prayerful form, a religion, namely, secular humanism—if there is any efficacy in that argument, is it worthwhile to address a basic negation of that establishment by the permission of any prayer, however unpowerful, and if one accepts for the sake of argument the definition of prayer being the raising of the heart and mind to God, that's all—it may be in beseech, it may be in a request for forgiveness, it may be thanksgiving, it may be based on many motives—but are we not also facing the question of whether or not it is better to permit the raising of hearts and minds to God in the schoolroom, even if it is in a relatively impotent or unspecific form, as opposed to denying it being done? Is there any validity to that kind of postulation?

Rabbi SIEGEL. If you permit me, Senator, I think that you put it in a very good form. I think the prayer that you read, with respectful suggestion to eliminate "in the name of our Lord," so that it could be said by people who are not Christians, or—I don't know all the Christian sects, there may be some who would object to it—

Senator DENTON. Rabbi, pardon me, but in the Old Testament isn't the term "Our Lord" used?

Rabbi SIEGEL. Yes, but we don't have "in the name of our Lord," that phrase. Of course, the word "Lord" is in all languages, in all religions.

Senator DENTON. Well, then, if you—

Rabbi SIEGEL. But I would say that that is certainly better than nothing, if that is the question you are asking me.

Senator DENTON. And if you were able to get the State to agree to eliminate "in the name of," and any other——

Rabbi SIEGEL. Any other echo that would——

Senator DENTON. You would say that it would be better than nothing.

Rabbi SIEGEL. Much better than nothing.

Senator DENTON. All right, sir. Mr. Murphy?

Mr. MURPHY. It's curious, I had the same reaction as I listened to the prayer; it was a common prayer and yet not without beauty—until you started to say the words "and this we ask in the name of * * *"—and I thought, oh, dear, what's the next word going to be? I thought you were going to say Jesus Christ, you know. And this is a common formula in Christian prayers, and a Jew might think, you know——

Senator DENTON. "What is he doing there?"

Mr. MURPHY. Yes. I see that piece of legislation as an honest, sincere effort, and one that I admire and hope people will never tire of doing it—it's going to be a very, very tough proposition, this whole question that we are wrestling with here today. I do fear what I would call State prayers. This one makes an honest effort to give the teacher or the instructor a number of options; one, for example, to say a prayer with the students—and I will give you a personal experience, not my own, but a relative of mine. My sister was a schoolteacher at one time, and she was putting on a class play in the seventh grade, and I was standing near the wings of the stage in this little school where she taught, and I heard her voice, which is quite recognizable, and all the children gathered around her. They wanted their play to be a success, so she said, now, children, let's all say together—and there was a profound silence—"Hail Mary, full of grace, the Lord is with thee." I was a little overcome by it at the beginning, but I asked her afterward, why did you do this? She said, as it happens, all of the children in the class were Catholics. Now, there is my idea of a voluntary prayer, a teacher asking the children, all of a common faith—if they were all Jews, I would say—and the teacher a Jew—let them say a prayer that appealed to them. As the Rabbi says, we don't pray to God in some kind of way—our religion is very particular to us, and its cultural depths mean a great deal to each one of us. And that is why I believe in the preservation of the great differences in this country.

I would call the legislative effort an honest and worthy effort, and yet I have my misgivings about it.

Senator DENTON. Thank you. Mr. Dugan?

Mr. DUGAN. Mr. Chairman, with all respect to the great State of Alabama, a prescribed prayer is exactly what our change would prohibit. I would expect that on a voluntary basis you would have a Jewish student praying one day to the God of Abraham, Isaac, and Jacob, if there were a Jewish student in the class; you would have a Roman Catholic student praying in the name of the Father, Son, and Holy Ghost, and crossing herself at the same time; you would have an evangelical student praying to our Lord and Saviour, Jesus Christ; you would have varieties of prayer. And I am very sensitive to Rabbi Siegel and to the 3 million Jewish people in this country, that the prescribing of a particular prayer—in the case of Ala-

bama, as expected, a Bible belt State, so to speak, perhaps dominated by Baptists more than any other denomination.

Senator DENTON. Church of Christ, then Baptist.

Mr. DUGAN. All right, whatever. But we can all select certain other States where other religions would dominate, and I am not reluctant to have my children hear the prayers of other faiths at all, as long as all are given an opportunity. And I think what would be missed in the richness of our pluralistic culture in our society would be all of that diversity of praying if the State were to prescribe. And then you are over on dangerous grounds of establishing. And we are trying to avoid that, and thus trying to be helpful in offering some verbiage that would prohibit prescribed prayers.

Senator DENTON. Well, the comments made by this panel have been extremely responsible and helpful. I won't hold you any further. I do think we are moving toward a principle of diversity of prayers over a time frame; if you have a classroom which reflects the diversity of religions, and promotes mutuality of respect among them.

That is an interesting, and I think a new thought on this committee. But we may be getting too far ahead of ourselves with respect to this constitutional amendment, which is looking only at whether or not we shall prohibit individual or group prayer. It does not specify how or where. These are extremely important considerations.

I hope you can see that the spirit of the chairman, and I believe of everyone on this committee, is to be very cautious regarding the admonitions which you have raised regarding the specificity of prayer language or the promotion of a sect.

Thank you very much, gentlemen.

[The prepared statements and submission of Messrs. Siegel, Murphy, and Dugan follow:]

PREPARED STATEMENT OF RABBI SEYMOUR SIEGEL

My name is Seymour Siegel. I am an ordained rabbi who now serves as Professor of Ethics and Theology at the Jewish Theological Seminary of America. I have the honor also to be the President of the American Jewish Forum, a group of Jewish citizens dedicated to the furtherance of conservative political principles.

I have come here this morning to speak in the name of a Tradition which has valued education and religious worship throughout its long history. The talmudic rabbis, in a famous statement, affirm that the world stands on three things: the learning and practice of Torah; the worship and service of God; and on the doing of deeds of kindness to our fellow men. Indeed the three things are intertwined. An education interfused with reverence for the Divine, will lead human beings to deal kindly with each other.

It is because of this, that I appear before you this morning to support the S.J. Resolution 199 which seeks to restore the freedom of our citizens to offer prayer in public schools and institutions.

THE IMPORTANCE OF PRAYER

The human being is the only creature who prays. In prayer, we acknowledge our dependence on a Power greater than our own. We perfect our character; establish a relationship between heaven and earth. It is prayer that makes us human. In the words of a great teacher of modern Judaism: "Prayer may not save us. It can make us worthy to be saved." From a religious point of view it is inconceivable that education be considered complete without being taught how to pray. A man may master all of science, literature, and history, if he does not know how to establish a dialogue with God, if he has not learned how to revere life and life's Creator-- he has not fully developed his humanity. An educational institution which neglects training in prayer has overlooked an indispensable aspect of human growth and development. It is because of this, that as far as I know, no educational system until relatively recent times did not include religious worship as part of its activities and curriculum.

PRAYER IN PUBLIC INSTITUTIONS AND SCHOOLS

In the United States most public events begin with prayer. The Senate and the House of Representatives began their deliberations this morning with prayer.

Inaugurations, sessions of the Supreme Court, thanksgiving declarations, all invoke God's presence and ask for His guidance. President Reagan, in calling for the passage of the proposed amendment quoted the words of Benjamin Franklin to the Constitutional Convention:

I beg leave to move-- that henceforth prayers
imploing the assistance of Heaven, and its blessings
on our deliberations, be held in this Assembly every
morning before we proceed to business.

It hardly seems logical that the very convention that was responsible for the Constitution would have viewed with favor the elimination of prayer from public schools when it ordained that its own sessions commence each day with a request for Divine assistance and blessings. Whatever the meaning of the First Amendment which prohibits the establishment of a state religion, it certainly did not mean the separation of religion from public institutions and functions. If we are endowed by our Creator with certain inalienable rights, we are bidden to acknowledge our Creator in the pursuit of deepening our understanding and practice of these rights.

It is frequently argued that religion is a private matter which should be limited in its expression in homes, churches and synagogues. Those who argue this way do not, I suggest, properly understand the basis of our Judeo-Christian religious tradition. Religion is not a privatsache, reserved for sacred space. Biblical religion, if anything, demands to be acknowledged in all aspects of life; When thou sittest in thy house, when thou walkest by the way, when thou sittest down and when thou risest up. A religion which is limited by the walls of houses of worship or in the seclusion of one's own home is less than a religion. Where else but in the places where the character of the next generation is formed; where the laws that govern the land are crafted; and where the decisions which decide the fate of nations are made should the fact that we are a nation "under God" be concretely acknowledged?

THE PUBLIC SCHOOLS

There has been a long tradition of including some form of public prayer in the public schools ever since their inception. The most striking evidence of this is the fact that the Massachusetts Board of Education, headed by Horace Mann removed sectarian instruction from the schools, but prescribed a program of

"daily Bible readings, devotional exercises and the constant inculcation of the precepts of morality." Thus the very founder of the American public school system favored the inclusion of religious devotions into the curriculum of the institutions. For 170 years after the adoption of the First Amendment, prayer was permitted in the public schools.

In our own epoch, when we have given over to the public schools many functions that were once the province of home and other institutions, we cannot in good conscience see the schools as places only for the imparting of information. Schools, where most children spend a good part of their day, are crucial in the formation of character as well as the inculcation of ideals, world views and moral values. There can be no education without the imparting of a more basic outlook on the nature of things. If any positive expression of religion is banned from the schools on the grounds of First Amendment guarantees, the public schools will become (As they already have become in many parts of our nation) proponents of a secular point of view. Just as nature abhors a vacuum, so the human soul cannot remain empty of spiritual values. If it is not nurtured by our traditional religious teachings, substitute faiths, formal and informal, will rush in. When people stop believing in something, observed G.K. Chesterton, it is not that they believe in nothing. It means that they believe in anything.

More and more American parents are being convinced that public schools which are given the task of driver education, sex education, and family education should also be concerned with the skill indispensable to human growth: the art of prayer.

I am convinced by those constitutional scholars who affirm that the intention of the First Amendment to the Constitution was to forbid the establishment of one religion over the other. It did not intend to remove religion altogether from our public life.

Those of us who wish to make possible the re-introduction of religious devotions in public schools, if desired by the parents, realize that no great civilization can flourish unless it is built around a central idea-- a core affirmation about life and the universe.

Martin Buber, perhaps the greatest Jewish thinker of our century has written:

To recognize the nature of what we call a great civilization, we must consider the great historical civilizations. We shall see that each of them can be understood only as a life-system.

In distinction to a thought system, which illuminates and elucidates the spheres of being from a central idea, a life-system is the real unit in which again and again the spheres of existence of a historical group build up around a supreme principle. Its fundamental character is always a religious and normative one; because it always implies an attachment of human life to the absolute. (At the Turning, P.11)

The public school is the central educational institution of our civilization. It has the awesome responsibility of educating the next generation to carry on the great ideas and structures of the American civilization. It cannot, at its peril and ours, neglect to articulate and promote "our supreme principle". I believe that the decisions of the Supreme Court barring religious expression has weakened our public schools as well as our culture. We have, therefore, no recourse except the amendment before us.

SUMMARY

To summarize therefore, we believe that there can be no true education without religious nurture. The American political system acknowledges the importance of prayer in providing for it in our great national events. The education of children must include religious expression. This was acknowledged from the very beginnings of our history. The First Amendment bars the establishment of one particular religion, not the elimination from public expression any religion. We need a constitutional amendment to make possible the religious freedom available to the American people before the ill-advised decisions of the Supreme Court which prohibited voluntary prayer in the public schools. Therefore, the current proposed Amendment should be supported.

THE AMENDMENT AND THE JEWISH COMMUNITY

What I have said is the view of many Jewish citizens. However, it would be misleading (and you will hear from others very soon) to deny that the majority of Jewish organizations oppose this Amendment. I believe these views to be misguided. They are based on the view that Jews, a small minority of the American people, will be coerced into participating in religious exercises in the framework of religious traditions they do not accept. Though there is some merit in this apprehension, I believe it is not enough to oppose the intent of the framers of this Amendment.

First of all, the proposed Amendment expressly eschews coercion of anyone to pray. If Jewish parents or athiest or Catholic parents do not wish to permit their children to join in school prayers, they are protected under this Amendment.

Secondly, the courts have decided to protect those students whose religious convictions make it impossible to recite the Pledge of Allegiance. We should and do respect such rights of conscience. We do not on that basis prohibit the recitation of the Pledge of Allegiance. We would hope that school boards around the country should be encouraged and assisted in formulating prayers which could be recited by the vast majority of the children. These kinds of prayers should be crafted so as to take into consideration the feelings and beliefs of Jewish school children as well as other minorities on the population. We should recognize that the strengthening of the religious sentiment in our culture is of such great importance to all of us that the impossibility of some of us, because of reasons of conscience to participate should not be used as a reason to deny to the others their opportunities to exercise their conscience. As the Supreme Court has stated: "We are a religious people whose institutions presuppose a Supreme Being." That, of course, applies to all of us: Protestants, Catholics and Jews. We should make every attempt to infuse our public institutions with religious sentiment which is common to our various traditions. If we cannot do so, we must realize that solutions will not satisfy everybody, but in a democratic society, the great Reinhold Niebuhr pointed out, we try to find provisional solutions to insoluble problems.

* * *

Forty years ago, a visitor to our country observed the American system and wrote: "Men will more and more realize that there is no meaning in democracy if there is no meaning in anything, and there is no meaning in anything if the universe has not a center of significance and an authority that is the author of our rights. There is truth in every ancient fable, and there is here something of fancy that finds the symbol of the Republic in the bird that bore the bolts of Jove. Owls and bats may wander where they will in darkness and for them as for the skeptics, the universe may have no center...but it was far back in the land of legends, where instincts find their true images, that the cry went forth that freedom is an eagle, whose glory is gazing at the sun." What this Amendment attempts, is to make possible this continued gazing at the sun by our future citizens as they learn that which will enable them to carry on the traditions of American freedom.

STATEMENT OF KNIGHTS OF COLUMBUS

Submitted by John M. Murphy

Editorial Comment in August Issue of COLUMBIA, Official Magazine of Knights of Columbus.

Restoring the Freedom to Pray

THE United States Congress has before it a constitutional amendment to permit voluntary prayer in public schools.

Submitted by President Ronald Reagan, the proposed amendment reads: "Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any state to participate in prayer."

The amendment is designed to overcome a Supreme Court philosophy of hostility to public prayer which goes back to the late 1940s. The high court's philosophy was spelled out by Associate Justice Hugo Black in 1947. He wrote: "Neither a state nor the federal government can set up a church. Neither can pass laws which aid one religion, aid all religions or prefer one religion over another. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."

In effect the Supreme Court held government may not do anything that would assist religion in any way. Such a stance of "neutrality" regarding religion and irreligion had the practical consequence of developing into hostility to religion. This was a complete break with the past and contrary to the mind of the Constitution's original framers when they drafted the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

History shows the framers had in mind a benevolent neutrality toward all religions without designating any one as the official religion. From the very beginning Congress opened its sessions with prayer, a practice that persists today. Just four years after the First Amendment was adopted the Continental Congress passed the Northwest Ordinance, calling for creation of schools in the Northwest Territory on the grounds that "religion, morality and knowledge are necessary to good government and the happiness of mankind."

Prior to sending the constitutional amendment to Congress, President Reagan participated in the National Day of Prayer on the first Thursday in May, a tradition which, he pointed out, was begun by the Continental Congress. Addressing those taking part in the prayer observance at the White House, the president said:

"Prayer has sustained our people in crisis, strengthened us in time of challenge and guided us through our daily lives since the first settlers came to this continent. . . .

"No one will ever convince me that a moment of voluntary prayer will harm a child or threaten a school or state.

"But I think it can strengthen our faith in a Creator who alone has the power to bless America. . . .

"No one must ever be forced to take part in any religious exercise. But neither should government forbid religious practice."

Msgr. Daniel Haye, general secretary of the U.S. Catholic Conference in Washington, welcomed President Reagan's initiative. The amendment would knock down a 1962 high court decision which declared that voluntary recitation in public schools of a prayer composed by the New York State Board of Regents was unconstitutional, and a 1963 court ruling asserting that voluntary participation by students in

Bible reading or recitation of the Lord's prayer in public schools was likewise unconstitutional.

Msgr. Haye pointed out that the amendment really should deal with the larger issue of voluntary religious activities such as voluntary religious instruction in public schools, which was declared unconstitutional by the high court in 1948. The court then stated that a program for releasing children, with parental consent, from public-school classes so they could receive religious instruction on public-school premises from representatives of their own faith was unconstitutional. Msgr. Haye noted that an amendment specifically reversing the 1948 decision would be "a powerful factor in restoring to all Americans a basic liberty of which they are now deprived."

Repeated polls indicate voluntary prayer in public schools has broad support. From 70 to 85 percent favor a constitutional amendment restoring to children the right to pray in schools. The importance of the amendment is underlined by the fact that only a few months ago the Supreme Court ruled unconstitutional the attempt of a group of high school students near Albany, N.Y., to gather at their school for prayer before class started.

The traditional anti-prayer groups have voiced opposition to the proposed amendment and threaten vociferous lobbying. Spearheading the drive are the American Civil Liberties Union, Americans United for Separation of Church and State and the National Coalition for Public Education and Religious Liberty.

Passage of the prayer amendment would serve to moderate the current judicial philosophy of hostility to religion. It also would set the stage for other voluntary religious exercises, including religious education under the auspices of parental committees.

Since prayer and discussion of religious values were stopped in the public school by the Supreme Court there has been a serious deterioration of moral standards. To compensate for the absence of a religious philosophy some schools have introduced "values clarification" sessions. In these gatherings moderators try to help students discover, clarify and strengthen their own personal values, taking precautions not to impose any religious or moral standards on the group. What has evolved, however, has not brought great benefit to either the students or to society. Rather the "values" discovered and strengthened were largely for self-gratification, the opposite of traditional Judeo-Christian ethics. Consequently the American public schools have been propagating a form of paganism, paralleling the philosophy inculcated behind the Iron Curtain.

The Declaration of Independence, which led to establishment of the United States, began with an appeal to God as the origin of all rights. If the prayer amendment is adopted, it will restore to children the right to pray to and discuss the Supreme Being without a suffocating veto by the Supreme Court. All interested in restoring this right should write to their congressman, House of Representatives, Washington, D.C. 20515, and to their senators, U.S. Senate, Washington, D.C. 20510, urging support for the amendment to permit voluntary prayer in schools.

Elmer Von Flecht
COLUMBIA

PREPARED STATEMENT OF ROBERT P. DUGAN, JR.

The National Association of Evangelicals appreciates this opportunity to testify in support of S.J. Res. 199. NAE is an association of some 36,000 churches included within forty member denominations and an additional thirty-five nonmember denominations. We serve a constituency of 10-15 million people through our commissions and affiliates, such as World Relief and National Religious Broadcasters.

On behalf of the National Association of Evangelicals, I want to applaud the President for initiating the effort to restore religious freedoms which have been eroded by the courts. My testimony will (1) focus on the need for a constitutional amendment to return to the original meaning of the First Amendment by restoring a balance between the Establishment and Free Exercise Clauses, (2) support the basic concept of S.J. Res. 199, and (3) offer for the consideration of this Committee a suggested change in language to strengthen the proposed amendment. Before proceeding to the body of my testimony, I would like to associate my remarks with the excellent legal analysis of the amendment prepared by the Justice Department's Office of Legal Policy dated May 14, 1982.

I

Americans are generally united on the subject of school prayer. By majorities of 75% and more, they endorse the concept of voluntary group prayer in the nation's public schools. Why?

In Engel v. Vitale, 370 U.S. 421 (1962) and Abington School District v. Schempp, 374 U.S. 203 (1963), the Supreme Court banned from public schools as unconstitutional both government-sponsored prayers and the devotional reading of the Bible. If interpreted narrowly, those decisions would not necessarily have proven harmful, but in practice the lower courts and school administrators have carried the spirit of those decisions further than was warranted. Those who categorically oppose prayer in schools have been successful in virtually eradicating any kind of religious reference in many public schools.

Let me cite just a few examples. In Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F. 2d 1038 (5th Cir. 1982), the court held that a school system's permission for students to conduct voluntary meetings for educational, religious, moral, or ethical purposes on school property before or after regular class hours violated the Establishment Clause. See also Brandon v. Board of Education, 635 F.2d 971 (2d Cir. 1980), cert. denied, 102 S. Ct. 970 (1981). In another case, a school district's decision to allow student initiated prayer at voluntary school assemblies unsupervised by teachers was struck down on Establishment Clause grounds. Collins v. Chandler Unified School District, 644 F.2d 759 (9th Cir.), cert. denied, 102 S. Ct. 322 (1981). And in Stein v. Oshinsky, 348 F.2d 999 (2d Cir.), cert. denied, 382 U.S. 957 (1965), a school principal's order forbidding

kindergarten students from saying grace before meals on their own initiative was upheld.

These cases, as well as a host of others, reveal a propensity of the courts to view every form of religious activity solely in Establishment Clause terms. The President's proposed amendment recognizes the urgent need to return to the original meaning of the First Amendment by restoring more of a balance between the Establishment and Free Exercise Clauses.

Opponents of the President's initiative have been quick to observe that the responsibility for religious training rests with the home and the church. We couldn't agree more. But their truncated analysis fails to address the problem of millions of school-age young people who, for lack of any meaningful acknowledgment of God in the public schools, are left to conclude that the state recognizes no power higher than its own. Creation of such an impression is not in keeping with the religious heritage bequeathed us by our Founding Fathers, with longstanding national tradition, and with the desire of the great majority of our citizens today.

This Committee faces a grave responsibility to respond to the wishes of the American people, who in their inherent wisdom realize the need for change.

II

S.J. Res. 199 would constructively amend the Constitution by adding an Article reading as follows:

Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any State to participate in prayer.

This amendment steers a wise course by not conferring an affirmative right to prayer in the public schools. It would simply remove any constitutional obstacle to voluntary prayer. In doing so it would meet the problem we have indicated — the need to shift the focus from the Establishment Clause to the Free Exercise Clause in order that the public schools be permitted to accommodate the free exercise of religion.

In an effort to live up to the severe constraints of court-imposed "neutrality," our public schools have avoided even acknowledging the existence of God. This public school environment, which in effect makes God irrelevant, is weighted with unspoken values. It subtly makes man the measure of all things — the very definition of secular humanism. The distressing irony is that the Supreme Court has recognized Secular Humanism as one of the nontheistic religions. Torcaso v. Watkins, 367 U.S. 488, 495 (1961). If we are to avoid establishing humanism in the public

schools, there has to be some opportunity for opposing views to be heard. Today government "neutrality" is a myth.

Justice Stewart has proven to be a prophet. As he said in his powerful dissent in Abington School District v. Schempp, 374 U.S. at 313:

[A] compulsory state educational system so structures a child's life that if religious exercises are held to be an impermissible activity in schools, religion is placed at an artificial and state-created disadvantage. Viewed in this light, permission of such exercises for those who want them is necessary if the schools are truly to be neutral in the matter of religion. And a refusal to permit religious exercises thus is seen, not as the realization of state neutrality, but rather as the establishment of a religion of secularism, ***.

Opponents of the proposed amendment, in asserting that religion belongs only in the home and church, overlook this reality. The proposed amendment would redress the present lack of neutrality by permitting voluntary prayer in our public schools.

III

While endorsing the proposed amendment, we would like to submit for the Committee's consideration some language we believe would strengthen it. The substance of the changes we suggest is indicated by underscoring in the following version of the amendment:

Nothing in this Constitution shall be construed to prohibit prayer or other religious activity in public schools or other public institutions. Neither the United States nor any State shall require any person to participate in prayer or other religious activity, or influence the form or content of any prayer or other religious activity.

This version of the proposed amendment would expand its scope by permitting a variety of voluntary religious activity — prayer, Bible reading, religious clubs, religious instruction, and so forth. But it would restrict the potential operation of the President's amendment by prohibiting government influence on the form or content of any prayer or other religious activity.

Let me elaborate on our reasons for these changes.

The 22 word prayer struck down as a violation of the Establishment Clause in Engle v. Vitale, 370 U.S. 421, 422 (1962), reads as follows: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."

That kind of prayer, routinely repeated every school day, is far removed from

the kind of meaningful religious expression that should be permitted in the public schools. Hence our expansion in the proposed amendment to include "other religious activity."

Our version of the amendment would (1) treat persons of every belief or unbelief equally by prohibiting the government from influencing the form or content of the religious activity, and (2) overrule McCullum v. Board of Education, 333 U.S. 203 (1948), to the extent that case was based on the physical location of the program of released time religious instruction in the public schools.

I would like to expand on these two points in terms of Zorach v. Clauston, 343 U.S. 306 (1952) and the McCullum case, *supra*.

In Zorach, released time programs of religious instruction off the school premises were held constitutional. The only factual difference of any consequence between Zorach and McCullum, which struck down a released time program of religious instruction in the public schools, is the physical location of the religious instruction. The location of such activity should not be the conclusive determinant of constitutionality. Yet, as interpreted by the Supreme Court, that is the law of the land. It needs to be changed.

The mere physical use of a public school building is not the functional equivalent of state sponsorship or entanglement. (Many public schools are presently being used as meeting places for churches or synagogues on weekends.) Physical proximity does not automatically make church and state one. The use of public school buildings for religious activity should be permitted as an accommodation to the free exercise of religion.

The First Amendment does not bar cooperation between church and state. Of course the state must do no more than cooperate in making its physical facilities available for the religious activity on the same basis as it would for any other activity, including any arrangement for financial reimbursement. Such a lack of entanglement would be constitutionally guaranteed by the language that we suggest be added to the proposed amendment, for it would prohibit the states from influencing the form or content of any prayer or other religious activity.

We have used the word "influence," rather than "prescribe," in order to make it clear that the state cannot, directly or indirectly, have anything to do with the form or content of the religious activity. This would not preclude school authorities from scheduling the school day as they see fit and from assuring that such matters as fire regulations are observed. However, it would permit our public schools, at the discretion of the school authorities, to cooperate with the people of the community in making the school building available for religious activity.

What we propose here today is nothing less than a new birth of freedom in this religiously pluralistic society. Our proposal would assure persons of every faith — as well as those who do not believe — the opportunity to participate in a variety of activity using the facilities of the public schools. There could be Bible study, prayer, religious instruction, panel presentations, or debates, according to the wishes of the local community.

Students would be free to attend whatever activity they wished. They could go to meetings of their own faith, or attend with friends at sessions of another faith. The appeal of the program, not the influence of the state, would dictate attendance. This is what religious freedom — in truth, academic freedom — is all about. Our approach, to a great extent, reflects the free speech rationale of the Supreme Court in Widmar v. Vincent, 102 S. Ct. 269 (1981), which held that religious speech is entitled to the same constitutional protection as any other form of speech on a state university campus.

Far from being divisive, such a free and diverse program would promote understanding and tolerance of others' beliefs. That to us would be a far healthier situation than the present state of affairs in the public schools where there is often intolerance of religious belief.

We are encouraged by the potential of a constitutional amendment which would restore a balance between the Establishment Clause and the Free Exercise Clause. We see no good reason why the states, if they choose, should not be permitted to cooperate with the people in allowing religious expression — uninfluenced by the state — in our public schools. It is time that our public schools cease to be the only public institution where a meaningful acknowledgment of God is forbidden.

STATEMENT OF SENATOR GRASSLEY

Senator GRASSLEY. It has been 8 years since I came to the Congress and this is the first opportunity that I have had to consider in depth the subject of prayer in the public schools and changing the Supreme Court decision.

Mr. Chairman, I am pleased to have this opportunity to hear the testimony of the many distinguished witnesses that are scheduled to appear before this committee today. I am especially pleased to see that my friends and colleagues, Senator Helms and Senator Hatfield, were here today to testify on this important issue. I looked forward to hearing their thoughts on this subject.

We are here today to consider Senate Joint Resolution 199, President Reagan's proposed constitutional amendment relating to school prayer. This resolution, if approved by two-thirds vote of both houses of Congress and subsequently ratified by three-fourths of the States, would add the following Article to the Constitution:

Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any State to participate in prayer.

It has been nearly 20 years since the Supreme Court handed down its rulings in *Engle v. Vitale* and *Abington v. Schemp*. I remember well the tumult and uproar that followed these decisions. From across the Nation there arose the call for the Congress to take immediate action to overrule these decisions. That was 20 years ago.

It has been noted that within 3 days of the *Engle* ruling, more than 50 proposed constitutional amendments were introduced. By the end of the 88th Congress, after *Abington*, more than 150 had been offered. Numerous such proposals with respect to this issue have been offered in every Congress since that time.

Of these, one of the most famous was the 1966 proposal offered by Senator Dirksen of Illinois, the gentleman for whom this building was named. The Dirksen amendment embodied language similar to that now offered by President Reagan. Extensive hearings on the Dirksen amendment were held in 1966 by the Senate Judiciary Subcommittee on Constitutional Amendments.

Furthermore, the House Judiciary Committee held hearings in 1964 on a proposed constitutional amendment offered by Congressman Becker of New York. A thorough review of those proceedings allows for an enlightened perspective on this issue. I would hope that my colleagues, in evaluating the President's proposal, would pay deference to the voluminous record that was amassed in these proceedings.

Mr. Chairman, I am a firm believer in the power of prayer. Accordingly, I would hope that at some time during the school day my own children would have the opportunity to voluntarily acknowledge their belief in and dependence upon God through prayer without having that dampened, discouraged or prohibited by the State. My personal beliefs in this regard do not necessarily mean, however, that I am unshakeably wedded to any specific measure which has been proposed so far. But I do congratulate the President for having the courage and strength to have taken a leadership position on this amendment. His actions have reopened the

form of deliberation on this critical issue and I think that that is something that is appreciated by people at the grassroots as the polls show overwhelming support for the concept of such a proposal.

I share the concerns of those who have witnessed the heavy-handedness with which the lower Federal courts have interpreted and applied the *Engle* and *Abington* decisions. The problems that have arisen from these interpretations often seem to have little connection to the original Supreme Court decisions. I would like to note the comments in this regard made by Mr. Robert P. Dugan, Jr. in his prepared testimony. He states:

If interpreted narrowly, those decisions would not necessarily have proven harmful, but in practice the lower courts and school administrators have carried the spirit of those decisions further than was warranted.

It appears to me that there remains much confusion as to just what types of activities are outlawed by the *Engle* and *Abington* decisions. Perhaps the most damaging consequences of these decisions have been their chilling effect on the policies of local school boards. I would hope that through these proceedings we could shed some light on the true meaning of the Supreme Court's decisions.

Furthermore, we should determine if there are any specific problems that have arisen from the lower court interpretations of those decisions. If such problems are identified, then it would be appropriate to investigate all channels by which these problems could be rectified. We may find that there may be more effective vehicles than Senate Joint Resolution 199 for this purpose.

It is not a simple task to sort through the complex and emotional problems that are raised by the President's proposed amendment. I am sure that in the course of these proceedings we will have ample opportunity to raise and discuss the numerous questions that are posed by this amendment. For example: What is voluntary prayer? Are any other types of religious activities protected by this amendment? Is the prayer protected by this amendment to be nondenominational? Is there any such thing as a truly nondenominational prayer? Who will compose such prayers? Will the States have the opportunity to define their own policies in this regard? And we could go on and on with other questions that we hope to have answered.

In closing I would urge my colleagues to exercise extreme caution in their efforts to alter in any manner the protections of religious freedom afforded by the first amendment to the Constitution. If this body should determine that there is an imbalance in the court's interpretations of the free exercise clause and the establishment clause, then some course of action may be in order. We must be careful however not to tip the scales in our efforts to rectify these practical problems.

Thank you, Mr. Chairman.

Senator DENTON. Thank you, Senator Grassley.

May I ask you to help me out on something, if you can? We have a vote pending on the floor and rather than delay for perhaps 12 minutes while both of us go, would you be kind enough to go and then come back and relieve me while I go?

Thank you.

The second panel we will hear from today will consist of Mr. Ed McAteer, Dr. Ron Godwin, who is unable to come; and Mr. Gary Jarmin.

Welcome, gentlemen, and proceed with your opening statements.

STATEMENTS OF ED McATEER, RELIGIOUS ROUNDTABLE, ARLINGTON, VA; AND GARY JARMIN, DIRECTOR, PROJECT PRAYER, WASHINGTON, D.C.

Mr. McATEER. My name is Ed McAteer. I am president of the Religious Roundtable, a 50-State organization of business political and religious leaders whose focus is public policy concerning moral issues. I am especially delighted to speak in favor of this constitutional amendment today because of what I perceive to be the tremendous importance that it has to not only the well being of our country but to all of Western civilization.

I would like to, first of all, bring into focus, if I am able to, the priority that God places on prayer and then the following positive results of prayer. I would like to do that by beginning with a little poem called *The Secret*. It goes thusly:

I met God in the morning when my day was at its best and his presence came like sunrise, like a glory in my breast. All day long his presence lingered. All day long he stayed with me and we sailed with perfect calmness over a very troubled sea. Other ships were broke and battered. Other ships were sore distressed, but the winds which seemed to drive them brought to me a perfect rest. Then I thought of other mornings with a keen remorse of mind when I too had left the moorings, with His presence there behind. So I think I know the secret learned from many a troubled way, you must seek God in the morning if you want Him through the day.

And Senator, your name's sake, the great prophet Jeremiah, had this to say. He said: "Call unto me and I will answer Thee and I will show Thee great and mighty things which Thou knowest not."—Jeremiah 33:3.

In the first chapter of the Book of the Revelation, the Bible reminds us that the praise of the saints like a sweet-smelling perfume comes up before the altar of the Lord.

The Book of Isaiah says that: "His ear is not heavy, that it cannot hear. His arm is not short, that he cannot save. But our iniquities have separated between us and our God."

And then quoting from former President Eisenhower's favorite scripture: "If My people which are called by My name will humble themselves and pray and turn from their wicked ways, and seek my face then will I hear from Heaven and will heal their land."

Second, I think it is very important, as has been said, that we understand the difference in the separation of church and state and the separating of God from government. I personally am strongly opposed to church over state or vice versa but I have no question about it, that after a thorough investigation, our Founding Fathers did not in any way have in mind what has happened since 1962—or did happen in 1962. That, I submit, was separating God from government.

I ask the question: Were we wrong for 300 years in the school-rooms of our country by allowing our children to pray? Have we been wrong for 170 years after the establishment of the first amendment?

Third, in answer to those who contend we already have voluntary prayer in public schools, I would answer that by saying, certainly, people in Siberian labor camps can practice voluntary prayer. A prisoner in solitary confinement on death row can practice voluntary prayer. This is not what we have in mind when we say that our little children should be allowed in the classrooms of this country to pray.

Fourth, the consequences of a "go without God" philosophy in our Nation's classrooms since the 1962 court decision, from the standpoint of discipline problems, moral problems, and academic records, I submit—that there is a predictable tracing of what has happened.

And fifth, with others who have already mentioned it, the overwhelming majority of the American people support the President on this amendment, something like 75 percent.

Recently at the Nation's largest evangelical convention, the Southern Baptist's Convention, when the question was properly framed, when the agenda for the debate was properly set, overwhelmingly the people when they were asked what they thought about voluntary prayer, they voted 3 to 1 in favor of this constitutional amendment.

Sixth, I submit that for the well-being of our country we must practice and promote anywhere we can, not pervert and prevent, prayer and in answer to those, some sincerely, that are afraid of the heathen praying, I would remind them of the Prophet Elijah. He invited those that did not believe in God to pray. As a matter of fact, he invited 450 prophets all day long to pray and after they went through their futile exercises, then Elijah prayed, things happened in the nation.

Thomas Jefferson dipped his pen and wrote:

Prudence, indeed, will dictate that government long established should not be changed for light and transient causes, and accordingly, all experience has shown that mankind is more disposed to suffer while evils are sufferable than to right themselves by abolishing the forms to which they are accustomed. Notwithstanding, if it be true that no rulers can be safe where the doctrine of resistance is taught, it must be true that no nation can be safe where the contrary is taught.

Jefferson wrote that when any form of government becomes destructive of its ends, it is the right of the people to alter or abolish it and to institute new government, laying its foundation of such principles and organizing its powers in such forms as to them shall seem most likely to effect their safety and happiness.

Friends, I soberly remind you, if we stand tamely by while the enemies of God are so busy fostering this ill-advised evil, we will fall despised and unpitied and our ruin will be of ourselves.

As matters of political nature are to be found in the word of God, to discourse upon them is sometimes our duty and it is especially so at this day, in which we are called to contend for both our civil and religious rights. It is now our duty to faithfully warn our people of their danger and seriously caution them to beware of anything that may be prejudicial to both our conventions and country's cause.

Thomas Jefferson wrote that when a long train of abuses and usurpations pursuing invariably the same object evinces a design to reduce them under despotism it is their right, it is their duty to

throw off such government and to provide new grounds for their future security.

Senator DENTON. Excuse me, Mr. McAteer. I have to go vote now. I hope that Senator Grassley has voted and is on his way back. Would you please summarize the remainder of your statement and then submit it for the record?

Mr. McATEER. I will do that, Senator. I will summarize it by saying, I am absolutely, beyond my ability to articulate it, rejoicing that we have a President who understands the great importance of Proverbs 29:2 that says when the righteous are in authority the people rejoice. When the wicked bear power, the people mourn.

I heartily support the amendment and I submit myself to working to see that this important decision is a positive decision in reversing what I feel, along with millions of other Americans, is a very, very bad decision that has been fostered upon our people now for some 20 years.

Senator DENTON. Thank you, Mr. McAteer.

Before I go to vote, I want to acknowledge that I admire you specifically for one thing I noticed in my hometown which took place while I was campaigning for the Senate. I had expressed the hope that some of the fundamental evangelical religious organizations in the South would seek to bring into their ranks at the top some of our black brethren and I was edified when I read in the paper that at a meeting you had in Mobile, Ala., five black and five white clergymen were on the stage that day. I expressed that appreciation before. I wanted to do it in this forum.

I will be back as soon as I vote.

Mr. Jarmin, if you would, you could begin making your opening statement with the staff. I assure you it will all be in the record and I will read it very carefully.

Mr. JARMIN. Rather than reading my entire statement, I would just like to touch on a few points contained in it and submit it for the record.

I suppose I should begin by saying that I am here representing—wearing two hats. I am legislative director of Christian Voice but I am here also today representing Project Prayer. Project Prayer is a coalition, currently over 110 organizations and leaders, that represent millions of Americans throughout the country who are joined together to urge Congress to adopt this proposed constitutional amendment.

We also would like to urge this committee to very quickly and speedily consider this legislation and report it to the Senate floor as soon as possible.

There are many excellent arguments one could make why prayer should be returned to the schools and I think the previous panel articulated some of those well. I think the most important of all is very simple. The people want it. The people have been waiting for 20 years for Congress to do something about it and Congress has done nothing about it.

If you look at the polls, of course, overwhelmingly three-quarters of the American people support school prayer. In fact, in every major poll taken since 1962, the first decision that eliminated prayer, we find that virtually—that 75 percent or more of people supporting prayer had been consistent throughout.

Now we have come to this crisis, I think, for a couple of reasons. For 170 years we had a consensus in this Nation that prayer in public schools was correct, it was constitutional, and suddenly, in 1962, we changed 170 years of history. We changed the interpretation of the Constitution for what it had been for 170 years.

That leads me to an observation. Either the Founding Fathers and the American people for 170 years were totally wrong and suddenly in 1962 the light dawned on us that prayer in schools was bad. It cannot be both ways. You cannot have it both ways. Either the American people, the courts and all of our Founding Fathers and everybody since from the beginning of our country until 1962—either they were right or the Supreme Court in 1962 was right.

Obviously, I think the Supreme Court was totally wrong. What we have here is a classic case of constitutional revisionism and a vast distortion and misunderstanding of what the first amendment intended. And as my brother Ed here mentioned, there is clearly a gross distortion of what the separation concept actually meant. It is clear that it was meant purely to prevent Congress and the Federal Government from establishing an official state church such as the Church of England. In no way was it intended, in my opinion and the opinion of most people testifying today, that this was intended to prevent prayer as an activity in any type of public gathering, including in a public school.

So I think that we have to overcome this argument first and foremost. Those who advocate the separation argument are preaching constitutional revisionism which flies totally in the face of the Constitution itself and history.

In fact, there is an illogical contradiction to the fact that we have currently many types of religious exercises and prayer exercises in many public official institutions. Prayer in Congress, prayer in the Supreme Court, in numerous local State activities throughout the country. We find this in all walks of life.

So let us assume the other side is correct and the separation argument was correct. If you take it to its logical conclusion then, then we must immediately in this Congress, those who vote against this amendment—if they have any ounce of honesty, any ounce of intellectual honesty, would immediately submit legislation tomorrow abolishing prayer in Congress because how—what more official public State body can you have than the Congress of the United States and if public-supported educational institutions cannot have prayer, such as a public school, then why in the world can we have it here?

So I would challenge those who would vote against this, if they are totally logical and consistent and honest, they would introduce legislation tomorrow to abolish prayer in the Senate and the House of Representatives, to abolish the chaplains in the armed services, to abolish any form or reference to God in any public or official document that has ever existed or will come in the future. That is where it logically leads.

I would also point out that the motive I believe of some of those, not all, of the other side who oppose this amendment or support the Supreme Court decisions that abolish school prayer—I think part of the motive is basically a hostility toward religion, and an

effort to purge any influence of God in any of our public life. We have seen not only court cases involving voluntary prayer but we have seen court suits led by the other side, particularly the ACLU, in which they have tried to abolish having Nativity scenes in front of a public building in Colorado. They have tried to abolish Christmas pageants or having children sing Christmas carols in their schools.

We now have Madeline O'Hare with a suit trying to force Congress to abolish the chaplains that they have. So it is not just the public schools.

What we have is an attack on religious influence. Or the acknowledging of God in many and all of our public activities.

So we have a great crisis here. This flies in the tradition of our history and really is an effort by those who preach a philosophy of secular humanism to impose that philosophy on public officialdom and public life at the expense of our freedom to worship God. I think that is really the key issue here. What is unconstitutional is not the activity of prayer in the public schools. What is unconstitutional is the lack of it.

The first amendment clearly states that Congress shall make no law prohibiting the free exercise of religion. Clearly two or three cannot gather in His name in a public school. That is a fact based upon these decisions. Group prayer we are told is unconstitutional.

Well, if anything is unconstitutional, it is the State or the courts telling two or three children or more that they cannot gather and worship God in an organized way. This is totally unconstitutional and a violation of the free exercise of religion.

So I think this constitutional amendment is an excellent amendment. I think it will help to restore what is and should be the correct interpretation of the Constitution, allow for that freedom and that diversity of religious expression to be expressed in public schools and hopefully bring us to a situation where we can restore some of that lost value of reverence for God that is not allowed today in our public schools.

I think that that is a central purpose and a central reason why prayer is good and necessary in a public school. Our public institutions—our public schools, I mean, are not there just to teach children to read and write and other forms of academic study. The public schools also help to reinforce other values that we in society hold, we like to see inculcated in our children and reinforced. Such as the value of discipline. Without that a child cannot study. If he is not disciplined to study, to listen to his teacher, to pay attention, they are not going to learn. Discipline is a type of value we share. Respect for authority, teachers, the elderly—if you have no respect for that teacher and what that teacher is going to teach you, then, obviously, you are not going to learn. There is an environment you are trying to foster. Without discipline, respect for authority, education is impossible.

Well, reverence and acknowledgment of God and that God does exist and does play a role in our daily life is another value that the vast majority of the people in society believe in. I think restoring that—prayer is helping to restore that value, where acknowledgment of God, our dependence upon Him and our need to depend on Him in our school life as well as outside of school.

Rather than going any further, I would just like to close by thanking this committee for taking the time to pay attention to this very important issue. Unfortunately, past Congresses, and, unfortunately, on the House side, we have not had the luxury of really making our feelings known this extensively on the issue.

I would like to thank Senator Thurmond and Senator Grassley and Senator Denton and all the others for being here today.

Finally, I would like to urge again and hope that this committee will act expeditiously on this constitutional amendment and report it to the Senate floor.

Thank you.

Senator GRASSLEY [presiding]. Thank you, Mr. Jarmin and Mr. McAteer for your testimony.

I would like to ask some questions for the chairman of the committee.

First of all, three general questions that were previously asked of other witnesses and then some specific questions we have for each of you.

Some opponents of school prayer say that Thomas Jefferson's doctrine of separation of church and state is a justification for the prohibiting of prayer in school. What is, in your opinion, wrong with that argument?

Mr. McATEER. Well, I think it is a classic example, Senator, of those who set the agenda for debate, who decide what the issues are and what they mean, contrary many times to what they are and what they mean, have completely misinterpreted and see it so many times in the media, what he said and when he said it, when the first amendment was written, that Thomas Jefferson seems to be looked to in that wall of church and state question.

Thomas Jefferson was in Paris, France, and actually the wall of separation of church and state statement as alluded to here earlier this morning was a letter that Thomas Jefferson wrote to the Danbury Baptists when they actually rebuked him for his lack of biblical pursuit in his duties and he said that it seemed to him—later on he wrote and apologized for that statement and I said a little earlier that from the standpoint of separation of church and state, right thinking people who believe in the Bible and who worship God and know the history, allegories through Europe and so forth, are unalterably opposed to church ruling the state and vice versa. But we must constantly remind people that do have a serious question about this that our Founding Fathers never intended to separate God from government because God is the basis of government. God established three institutions: The home, the church, and the government and he established government for the sole purpose of restraining evil and protecting its citizens.

So I say, it is a fallacious argument and once it is really explained and people understand it, then they have no fear of this amendment that we are talking about.

Senator GRASSLEY. Mr. Jarmin?

Mr. JARMIN. I think I addressed that issue in my testimony. I would just say, regardless of what Thomas Jefferson meant by what he said, the fact is that that is not a substitute for the amendment itself. What is in the Constitution is what is important, not what Jefferson said many, many years later, after it was written.

Also, I think that he has been greatly misinterpreted. But, again, I would share with Mr. McAteer, that separation was intended only—the separation does not exist in the first amendment, No. 1. The first amendment essentially states Congress shall make no law with regard to the establishment of religion and that was clearly interpreted by everybody at that time who understood it to mean that the Federal Government could not establish an official state church such as the Church of England. Clearly it did not mean that we should separate God from government because, on the one hand, why would the Founding Fathers write the first amendment meaning this intended us to separate God from government at the same time they asked to join together in prayer while they were drafting the Constitution. At the close of the Constitutional Convention they called for a declaration of a day of prayer. I think George Washington called for it.

So clearly prayer is not religion. It is a form of religious activity but not in the traditional sense of the word a religion. It cannot be established just through the mere act of prayer, as the Founding Fathers intended.

This is just totally a fallacious argument, a great distortion of the meaning of the Constitution, to use that as a means of prohibiting prayer in public schools.

Senator GRASSLEY. The chairman's second general question states, "Opponents of school prayer are worried that this constitutional amendment will enable States to draft prescribed prayers. Should the States be able to draft official prayers?"

Mr. McATEER. No. I am of the firm opinion that the word "voluntary" is very important because prayer, even as some of those who oppose this amendment say, and I agree with them, prayer is a very personal thing. But that does not mean it is a silent thing. We see in scriptures and history and church and institutions that prayer, real prayer, is secret prayer but the acknowledgment of God in prayer is a public and a voluntary exercise at its best.

So I am opposed to a prescribed prayer. I go fully with the amendment as it says, voluntary prayer.

Mr. JARMIN. Well, I agree and I disagree with most of the statements that have been made on this issue up to now.

On the one hand, yes, I do not think it is necessarily desirable that a State be able to draft a prayer but I do not believe that this constitutional amendment would enable a State to prescribe a prayer and force any school district anywhere within that State to have to recite it. In fact, it might even be desirable for a State to come up with a proposed prayer simply to provide it to the local districts as a guide if they would choose to have a formal prayer they want recited. Then the State can draft one. Fine. But there is nothing in the constitutional amendment that would force, in my opinion, would force a school district to have to use that prayer.

Listen to what it says, "No person shall be required by the United States or by any State to participate in prayer." I think if it went to court one could logically I think—one would have a good case to say that a State could not force a school district or anybody to have to use a prayer that it might prescribe. But I think using that word "prescribed" is misleading. "Prescribed" to me means, if

I understand English properly, that you are demanding or requiring that a person recite that particular prayer. I do not think that the Constitution would allow that—excuse me, this constitutional amendment.

Senator GRASSLEY. I think it is obvious but before the chairman takes over, I would like to mention that the word "voluntary" is not in this version or, I mean, this resolution, but you are going by the last sentence to imply voluntary.

Is there anything in the proposed constitutional amendment that you suggest would prohibit a State from proposing language to be recited?

Mr. McATEER. Ask the question again.

Senator GRASSLEY. Is there anything in the resolution before us that prevents a State from writing language that would be recited as a prayer?

Mr. McATEER. No; I do not think that there is but I am stating my personal opinion, that I am opposed to a written prayer.

Senator GRASSLEY. From your judgment is it implied that the State could not do that or are you saying that that is an open question?

Mr. McATEER. I am saying that it is an open thing.

Senator DENTON [presiding]. Gentlemen, perhaps you heard the discussion from the last panel regarding the concern that any prayer suitable for use in public schools could be a prayer of lowest common denominator, with little, if any, meaning which would violate the true devotional spirit of prayer.

Would you comment on that concern, Mr. McAteer?

Mr. McATEER. I think that is what we were just commenting on, sir.

Senator DENTON. I am sorry. I did not mean to repeat a question.

I thought I had good information on where we were. Have you expressed yourself on this question too, Mr. Jarmin?

Mr. JARMIN. I am not sure we got into it that much. I think, obviously, you would like prayer to be as inspiring as possible without question. That is under any circumstance. However, as I said in my testimony earlier, I think the real importance of a prayer is to reinforce a value of reverence, acknowledgment of God that—just as we try to enforce other values in our public school system, such as discipline, respect for authority, all of the ingredients which are imperative for a child to be educated. I think it is important that people do uphold reverence or acknowledgment of God as a value. Obviously, while I may not particularly care for the watered-down, noninspiring prayer, far better that than nothing because at least through that you are allowing children to acknowledge God's presence and call upon his guidance, even if in the most simple terms, and that helps to reinforce that value of reverence, meaningless or not, watered down or not. I think it is important for that reason alone.

Senator DENTON. Before you are dismissed, do either of you gentlemen have anything you would like to add? Thank you very much for your testimony this morning.

[The prepared statements of Messrs. McAteer and Jarmin follow:]

PREPARED STATEMENT OF ED E. McATEER

hear the words of a HEART BROKEN president over a century ago, as he spoke concerning the Civil War -- fondly do we hope -- fervently do we pray that this mighty scourge of war speedily pass away, yet if God wills that it continue until all the wealth piled by the bondman's two hundred and fifty years of unrequited toil shall be sunk and until every drop of blood drawn by the lash shall be paid by another drawn with sword, as was said three thousand years ago, so still it must be said, that the judgements of the Lord are true and righteous altogether.

Prophectic, searching words uttered by the president of the United States during a CRISIS PERIOD in American history.

More than a century passes and leaves its foot prints in the shifting sands of time and yet another crisis grips the "land of the free and the home of the brave."

Again, sober searching words are uttered by yet another American president... In the spring of 1982, two decades have passed since Jehovah God was EXPELLED from the classrooms of the American public schools.

Standing with over a hundred religious leaders in the Rose Garden of the White House, this president said, "no one will ever convince me that there is anything wrong with little school children praying in their classrooms", and followed this statement with a call for a constitutional amendment, to halt the ravages of a "go without God philosophy", by returning the right of VOLUNTARY PRAYER to America's school children.

Yet another American president, Thomas Jefferson, dipped his pen and wrote: "Prudence, indeed, will dictate that government long established should not be changed for light and transient causes, and accordingly, all experience has shown that mankind is more disposed to suffer while evils are sufferable than to right themselves by abolishing the forms to which they are accustomed."

Notwithstanding, if it be true that NO RULERS CAN BE SAFE where the doctrine of resistance is taught, it must be true that NO NATION can be safe where the contrary is taught.

Jefferson wrote, "that when any form of government becomes destructive of its ends, it is the right of the people to alter or to abolish it and to institute new government, laying its foundation on such principles and organizing its powers in such forms, as to them shall seem most likely to effect their safety and happiness."

Friends I soberly remind you, if we stand TAMELY by while the enemies of God are so busy fostering this ill-advised evil, we will fall DESPISED and UNPITIED and our ruin will be of ourselves.

As matters of a political nature are to be found in the word of God, to discourse upon them is sometimes our duty -- and it is especially so at this day, in which we are called to contend for both our civil and religious rights -- it is now our duty to FAITHFULLY WARN our people of their DANGER and seriously caution them to beware of anything that may be prejudicial to both our convention's and country's cause.

Thomas Jefferson wrote, "but when a long train of abuses and usurpations pursuing invariably the same object evinces a design to reduce them under despotism it is their right, it is their duty to throw off such government and to provide new grounds for their future security".

Such has been the patience sufferance of those who adhere to BIBLICAL PRINCIPLES in this convention and such is now the necessity which constrains us to alter the devastating decisions of the courts, even though CERTAIN CONVENTION LEADERS endorse the courts actions on ABORTION, SCHOOL PRAYER, and other anti-biblical positions.

We have seen for a course of years, and especially accelerating during the Warren court years, a series of plans and schemes by misguided judges, sometimes under ministerial influence, all evidently calculated to subjugate this country.

This American quarter of the globe seems to have been reserved in providence as a fixed and settled habitation for the Judeo-Christian faith. Where the church might own property and the right of rule and government so as not to be con-

troiled and oppressed in her CIVIL and RELIGIOUS LIBERTIES, by the tyrannical and persecuting powers of the land represented by the courts. As evidence of this observation, well over half of all funds and personnel for the worldwide spread of the gospel comes from the UNITED STATES, which represented only 6% of the world's population and 7% of the world's land area. When Jehovah God, to whom the earth belongs and the fullness thereof brought Bible loving people to this vast wilderness, as on eagles wings by His kind protecting providence, He gave this good land to them to be THEIR OWN LOT and inheritance forever.

Therefore, when considering the TREMENDOUS privilege and the AWESOME responsibility which we

Bold, for not only the well being of our own BLESSED AMERICA, but to all of western civilization, we MUST NOT, we CAN NOT, have the blood of these millions on our hand because of our failure to sound the alarm -- Ezekiel 33:6. Edmond Burke well said, "The only thing necessary for the triumph of evil is that good men do nothing".

I am fully convinced of the absolute importance of uniting in the most cordial friendship as fellow countrymen in this glorious struggle and fully sensible that to give the "Ark" a wrong "touch" in this crucial moment, might be of unspeakable dangerous consequence.

However, in the language of Holy Writ, there is a time for all things, a time to PREACH and a time to PRAY, a time to LAUGH, and a time to MOURN, there is a time to stand and to fight, and that time has now come.

When in 1962, the courts of our land declared God UNWELCOME IN OUR CLASSROOMS, the stage was set for the ushering in of that dark and infamous day commonly called Roe vs. Wade but more correctly termed the day of the SLAUGHTER OF THE INNOCENTS.

There is UNMISTAKENLY a direct connection between the two.

This was the place where the fatal legalized ABORTION scene really began, when Americans could legally begin to KILL Americans, and more like murderers and not Judges, in a nation on whose coin appear, "In God We Trust". Without invocation, without warning, when no war was proclaimed, they draw the sword of violence upon multiplied scores of little INNOCENT HELPLESS BABIES with a cruelty and barbarity which would have made the most hardened savage blush, they shed innocent blood but, O MY GOD, how shall I speak or describe the distress, the horror of that awful day, that gloomy day in 1973, allowing the mind to probe forward through the corridors of time and view the scene -- a battle field scene -- for in reality, a battle field is what the abortion issue actually is. We see them not only as innocent babes, but we see them as God had in mind for them to BE SPEN, men and women in full ADULTHOOD, loving and serving HIM. -- On yonder field we witness the innocent blood of our brethren and sisters SHED and from thence does their blood cry unto God for vengeance. There the beloved son and daughter, there the heavy head and there the blooming youth. There the man and woman in their full strength and bloom, with those of years.

They BLEED, they DIE, not by the sword of an open enemy with whom war is proclaimed on the field of battle, but by the HAND OF THOSE THAT DELIGHT in sordid and lurk privily that they may shed innocent blood.

But they bleed, they die not in their own cause, but in the cause of this whole people, in the cause of God, their country and posterity. They shall not bleed in vain. Surely there is one that avengeth and that will plead the cause of the injured and oppressed and in his own way, and in his own time, will avenge the innocent blood.

Our courts are not foreigners obtruded upon us from whence interference of interest and dissatisfaction would naturally arise.

Whoever will impartially consider the tragic scenes in wake of the dark Supreme Court decision of 1962 cannot help but see that our precious privileges have been invaded and only Heaven has been able to arrest the hand of violence in its ravages as a loving God has given us time to repent.

We are called to liberty, one of heaven's choicest blessings to mankind amid the various calamities of life. Liberty administers consolations, redoubles the pleasures of our highest gratifications, inspires the HUMAN BREAST with noblest sentiments, dilates the heart, expands the soul and is the source of almost

everything EXCELLENT and DESIRABLE on earth. Liberty animates industry and economy, promotes commerce, procures wealth -- cherishes the liberal arts and sciences and wears a most friendly aspect upon all the most important interest of mankind. Liberty cannot be separated from God even as we cannot separate God from our youth and expect to have liberty. The issue of PRAYER is the issue of liberty. LIBERTY for our physical, as well as our spiritual selves.

Well do the despots at home and abroad know that if charming freedom continues to spread her olive branches in America, that America will continue to be invincible. We must never forget that the political institutions of a people, especially the courts of a land must be consonant with the intellectual and spiritual elevation. Faced with DIRE and IMMEDIATE DANGERS, the praise of the Founders not only restrained them in thought and actions, it ever reflected the calm philosophy of their deeply religious outlook toward LIFE.

In what these men wrought we find strength, for what they wrought we have inherited, what they felt and thought, we may BELIEVE AND FEEL.

The key is sovereignty and sovereignty is a dual one, that of the SOUL and SPIRIT enunciated by the preaching of the gospel and that of the citizen ushered toward its political fulfillment in words which reverberates to us across the strands of 207 years of our glorious history.

"With firm reliance on the protection of divine providence, we mutually pledge to each other our lives, our fortunes, and our sacred honor."

Twenty precious, important years have been taken from the CHILDREN of our land -- we CANNOT absorb another period in our history comparable to the past two decades. Our very heritage calls out and says, WE CANNOT GO WITHOUT GOD!

The voluntary school prayer amendment will be consistent with the original purpose of the First Amendment, which was to enhance the opportunities of citizens to worship as they see fit. For 170 years after the adoption of the First Amendment, prayer was permitted in the public schools. In 1962, the Supreme Court held that prayer in the public schools violated the First Amendment provision forbidding an "establishment of religion."

Justice Potter Stewart, in a strong dissent from the Court's opinion, pointed out that the purpose of the Establishment Clause was to prevent the Federal Government from establishing an official religion. Justice Stewart pointed out that permitting school children to participate voluntarily in prayer is a far cry from designating a particular religion to which citizens must subscribe. He pointed out that the two Houses of Congress open their daily sessions with prayers, that our coins, our Pledge of Allegiance, and our National Anthem all reflect the truth that "we are a religious people whose institutions presuppose a Supreme Being." *Engle v. Vitale*, 370 U.S. 421 (1962) (Stewart, J., Dissenting).

The amendment will guarantee that no person shall be required by the United States or by any state to participate in prayer. Lower federal court decisions have suggested, for instance, that prayers by unofficial groups of students who congregate after class hours of their own volition are not really voluntary because other students might feel subtle pressure to join in the prayer. The amendment will reject such an approach.

The American political tradition is one of respect for diversity and for freedom of religious expression. It would be wrong to assume that states and localities would seek to stifle diversity or to offend members of their communities who hold minority religious views. In fact, prior to 1962, local school authorities demonstrated a respect both for religion and diverse views about religion.

The amendment will absolutely forbid public schools or other government agencies from requiring anyone to participate in any prayer or religious exercise. Anyone who is offended by the content of any prayer -- whether he is a member of a minority religious group, an atheist, or anyone else -- can simply refuse to participate; this constitutional right of refusal will be an absolute safeguard against the imposition of sectarian forms of worship.

The Lord's Prayer and the Ten Commandments are reflections of our Judeo-Christian heritage that could not fairly be described as instruments for the imposition of narrow sectarian dogmas on school children. Indeed, any reference to a "personal" God who is more than a mere "life-force" might be "denominational" insofar as it reflected the general beliefs of Judaism and Christianity to the exclusion of those who reject the idea of a personal God.

The amendment will affect other public institutions besides public schools. But this provision would effect little or no change in present judicial interpretations of the First Amendment. As Justice Stewart pointed out in his dissent in *Engle v. Vitale*, prayer is an important part of our national heritage and of our daily community life. Prayer in public places other than schools -- in public parks, in prisons, in hospitals, in legislatures, in Presidential Inaugural Addresses -- has never been held to violate the Constitution. The United States Supreme Court begins all its sessions with reference to Almighty God. The amendment would reaffirm this interpretation, subject to the right of every individual to refuse to participate in prayer or religious exercise.

The amendment would reaffirm the constitutionality of prayers in Congress and of armed service chaplains.

Judges and constitutional scholars hold a wide range of opinions on the extent to which government may directly or indirectly aid religious institutions. The amendment will deal only with public institutions and would not affect the constitutional status of private institutions.

School boards will not be required to permit students to pray. The amendment will simply remove any constitutional obstacle to voluntary prayer. If school boards decided that such prayers were a bad idea, they would be exactly as free to exclude prayer from the schools as they are now. But states and local school boards would also be free to permit voluntary prayer, a power that is now denied them.

Local prayer leaders will be free to compose their own prayers since the voluntary school prayer amendment will eliminate any federal constitutional obstacle. They could choose prayers that have already been written, or they could compose their own prayers. If groups of people are to be permitted to pray, someone must have the power to determine the content of such prayers.

The amendment will accept the premise that communities are a more appropriate forum than federal courts for decisions about the content of school prayers. Of course, no student or any other individual will be required to participate in any prayer to which he objected for any reason.

A constitutional amendment rather than statutory change is necessary to restore the right of prayer to the public schools. Legislative enactments will not be sufficient to overcome Supreme Court interpretations of constitutional provisions. Proposals to limit Supreme Court jurisdiction, even if constitutional, would not reverse existing Supreme Court decisions and would be inappropriate as a matter of policy.

There is overwhelming public support for restoring voluntary prayer to our public schools. It is an interesting, sober, and deeply disturbing fact that those who oppose the return of voluntary prayer to our public schools are generally those who favor abortion, homosexual rights, and the busing of our school children.

I submit that the President wishes to liberate the American people from a Supreme Court decision which is 20 years old even as Abraham Lincoln liberated the country from a Supreme Court decision 20 years old that legitimized slavery.

Frankly, in response to those who deceitfully and ignorantly claim that we have voluntary prayer in our schools, I respond by reminding them that so do prisoners in Siberian labor camps, and penitentiary inmates in solitary confinement. This is not the kind of voluntary prayer that this amendment has in mind.

For the glory of God, the good and well-being of our blessed country, the United States of America, and for the spiritual well-being of our dear little ones, I earnestly and prayerfully urge that the U. S. Senate and the House of Representatives act with all possible speed to nullify the infamous decision of the highest court of ours which virtually stopped prayer in our nation's class rooms.

PREPARED STATEMENT OF GARY L. JARMIN

Mr. Chairman and other distinguished Senators on the Committee, it is an honor to submit testimony on behalf of the Project Prayer Coalition. Project Prayer is a coalition of national leaders and organizations representing the leadership in the nation of those people working to restore voluntary prayer to public schools. Our current membership is 110 and we expect 150 by the end of next month. In one concerted effort we are working to push the school prayer legislation through both Houses of Congress this session. We enthusiastically endorse the school prayer amendment introduced by President Reagan and we thank the President for his initiative and commitment to restoring prayer to the public schools.

Recent polls indicate that the people, after twenty years, are ready for and want prayer restored to the schools. Public approval of voluntary school prayer ranges from 69 to 85 per cent of the population. (New York Times, May 7, 1982) Another poll has revealed that 75 per cent of the population want some form of allowance made for prayer in schools and 55 per cent also support a constitutional amendment to allow such prayer. (The Washington Post, May 22, 1982)

Support for the prayer amendment extends far beyond the conservative organizations which have kept the issue politically alive in the past several years. This support is due in a large part to the fact that the elimination of prayer from the schools went beyond protecting non-praying student's rights to abstain, to active denial of rights of praying students.

The First Amendment of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...". The intent of the Framers was to protect the people's right to the free exercise of religion and thus the prohibition on Congress from establishing a national church or using its influence to prefer one sect over another.

The Supreme Court, beginning with Everson v. Board of Education, 330 U.S. 1 (1947), has interpreted the establishment clause as an absolute prohibition on Congress, and the States for that matter, from supporting or fostering any religious activity. Hence, we have Engle v. Vitale, 370 U.S. 421 (1962) and Abington School District v. Schempp, 374 U.S. 203 (1963) prohibiting voluntary prayer and bible reading in public schools.

These Supreme Court decisions would lead one to believe that Thomas Jefferson's "wall of separation between church and state" was high and impregnable. But, while Jefferson's statement is "a powerful way of summarizing the effect of the First Amendment, it is clearly neither a complete statement nor a substitute for the words of the amendment itself." CRISWOLD, Absolute is in the Dark--A Discussion of the Approach of the Supreme Court to Constitutional Questions, 8 Utah L. Rev. 167, 174 (1963).

In a recent article in the Wall Street Journal (July 22, 1982) entitled "Defending the School Prayer Amendment...", Grover Rees III, author of the original draft of the school prayer amendment, said, the "wall of separation is a myth". The Framers' prohibition was on the Federal government not the States. Furthermore, this prohibition was only to prevent the establishment of a national church not the recitation of a prayer. For 200 years Americans have understood this difference.

Even if one were to assume that the Court's reasoning was correct, taken to its logical extreme any reference to or acknowledgement of God should be eliminated from public life. The chaplains in the Congress or even the military would be unconstitutional and therefore have to be abolished. American coinage engraved with "in God we trust" would be unconstitutional and therefore have to be changed. Ironically, the very body that has outlawed voluntary school prayer, the Supreme Court, continues to begin each session with a prayer, yet this practice too would have to be stopped because it also would be unconstitutional.

Opponents to school prayer focus their attention on the establishment

clause issue, but the real issue at the heart of the school prayer amendment is the issue of the right to the free exercise of religion. Since 1947, the Supreme Court decisions have overshadowed this issue. Today it is illegal for students to say grace before meals at school. It is illegal to organize or participate in a voluntary school prayer group that meets before or after school on school premises. The current law clearly is in violation of the students' right to the free exercise of religion. While it is true that any student may take a few moments and offer a silent prayer to God any time during the school day, this is a right shared by the students in the Soviet Union and as President Reagan has recently said, "public expressions of prayer should have more legitimacy in the United States than that which exists in an officially atheistic and totalitarian country."

The Supreme Court has misinterpreted the First Amendment in history and in substance. The Court has engaged itself in constitutional revisionism. In prohibiting voluntary school prayer the Court has gone beyond its jurisdiction and duty of interpreting laws and succeeded in making laws. The Court is in fact circumventing the democratic process and accomplishing what the Legislature is unable to.

The Tenth Amendment's division of powers between the central government and the states reserved to the states the power to deal with religious issues. The First Amendment prohibition, directed only to Congress, does not restrict church/state relations at the local level and the practice throughout the history of the nation, until 1962, has been to allow such decisions to be made by the state and local authorities. This school prayer amendment will restore to the states and local authorities this decision making power taken from them by the courts.

It is a concern of some people that the school prayer amendment will allow for state sanctioned school prayer. I would like to respond to that concern. First, the decisions whether or not to have a prayer and what type of prayer will be said should be made by the state and

local authorities. It is generally believed that state and local authorities, as opposed to the Federal courts, are better forums for making decisions relating to school prayer after weighing factors such as the desires of the students, parents and teachers along with community interests consistent with state law. Prior to 1962, local school authorities demonstrated a respect both for religion and diverse views about religion. Secondly, the amendment guarantees that no one shall be required to participate in school prayer. The state cannot mandate participation, so that at most, a state sponsored prayer could serve only as a guideline for local decision makers.

I would like to thank and commend Senator Thurmond's initiative and effort in introducing the school prayer amendment this session and say that we join Senator Thurmond in his support of President Reagan. It is my hope that these hearings will be followed by an immediate vote on the Senate floor passing the school prayer amendment this session. I am confident that state ratification will follow soon after, for the people have waited twenty years and are ready for voluntary prayer to be restored to public schools.

Thank-you.

Enclosure.

[From the Wall Street Journal, July 22, 1982]

DEFENDING THE SCHOOL PRAYER AMENDMENT

(By Grover Rees III)

Recently I attended a state college graduation ceremony that began with an invocation by a rabbi and ended with a benediction by a Catholic priest. On the way home I heard a radio commentator denounce President Reagan's proposed constitutional amendment on school prayer. The amendment, the man said, is a radical assault on one of our oldest and most fundamental constitutional principles, the "wall of separation" between government and religion.

The wall of separation is a myth. The record of the debate in Congress on the First Amendment ban against "establishment of religion" clearly indicates that its framers intended only to prohibit the *federal* government from designating a *particular* church to which all citizens must give their allegiance and their financial support. For 200 years the participants in the American constitutional consensus have understood the difference between establishing a church and saying a prayer.

They have invoked the aid of God in their legislative sessions, on their coins, in their national anthem, in their courts and—from the very beginning—in their public schools.

In 1962 six justices of the Supreme Court reversed the settled understanding of the meaning of the First Amendment, holding that it was unconstitutional for a school district to permit students to join in a brief nondenominational morning prayer. The Reagan amendment would simply reverse that decision and its progeny. The amendment would not require that prayers be said in public schools, but the decision would be made (as the framers of the Constitution intended it to be made) in local communities rather than in federal courts.

WILL CHOICE OFFEND PEOPLE

The arguments advanced by critics of the amendment are the same arguments that convinced the justices in 1962. They tend to show not that school prayer violates the constitution, but that it might be a bad idea.

The central problem with saying prayers in school is that somebody must choose the prayer. If the choice is left to local school authorities, they are free to choose prayers that could offend people. Christian prayers may offend Jewish students; Protestant prayers may offend Catholics, indeed, any prayer directed to a "personal" God may offend a student who believes that the Supreme Being is a "life-force," or that there is no God.

Alternatively, school boards may take it upon themselves to write their own prayers in an effort to avoid offending anyone. Such bureaucratic productions might be bland affirmations of reliance upon a lowest-common-denominator sort of God, a God with no attributes. To parents who wish their children to grow up loving and respecting a real God who is not at all boring, a meaningless prayer or an ugly prayer might be worse than no prayer at all.

Nor do critics of the amendment believe that school prayer will be truly voluntary. Although the Reagan amendment provides that no student may be forced to participate in any prayer to which he objects for any reason, they fear that students will be subliminally coerced into praying, or that they will be forced to listen to prayers with which they do not agree.

To decide whether there ought to be a constitutional rule against prayer in the schools, however, one should consider not only the worst that might happen if prayer is permitted, but also the possible consequences of its prohibition. I am not sure that it is ever possible for an institution to be neutral about a question of fact or value. When the institution is a school and the question is what attitude students will have toward God, it is not at all clear that neutrality is achieved by never mentioning God except in discussions of speculative philosophy and medieval history.

It is frequently observed that schools neither are nor should be merely places where facts are disseminated. Rather, a good school shapes the whole person; it prepares him for life in the world. Between the ages of six and 18—the years in which most of us develop attitudes about religion that will form the matrix for all future experiences and observations—our lives are built around the schools we attend. These schools treat Julius Caesar, Shakespeare, Nietzsche, Washington, Reagan and Brezhnev as real persons whose ideas and actions matter; only God is hypothetical and contingent. Among the values that are fundamental to our civilization, the public schools attempt more or less successfully to inculcate in their students the

love of freedom, of equality and of their fellow human beings. The love of God is conspicuous in its absence.

Neutrality toward God, in other words, is another myth. I know because I've tried it. I have doubts about God, and my doubts sometimes rise (or descend) to the level of disbelief. But I know that if God exists He is the most important thing in the universe and in my life. When I try to conduct any part of my life without regard to God I am not standing still but turning away.

God is also too important to be left out of the institution that seeks to prepare my child for life in the world. Like most Americans, I cannot afford private schools. The public schools will present my child with a set of facts and values that either includes or excludes God. I believe neither option to be neutral, so I hope his school day will include prayer, which is the affirmation of the love of God.

School is not, of course, the only influence in the lives of our children. Parents can teach their children how to pray. Parents can also teach their children patriotism and sex education. There is at least as good a chance that a child will be adversely affected by a teacher with idiosyncratic ideas about sex as by one who says the wrong prayer, but even the most fervent opponents of sex education seek only to persuade their school boards to omit it from the curriculum. Nobody thinks that the Supreme Court should declare it unconstitutional.

The observation that the Reagan amendment would not mandate school prayer but merely take power over the decision away from courts and give it back to school boards, goes a long way toward answering the horror stories advanced by opponents of the amendment. Any power is subject to abuse, but the possibility of abuse is seldom a sufficient argument against a power that can also be wielded beneficially.

The American political tradition is one of respect for minority opinions: in the 200 years during which prayers were said in our public schools, they were not typically used as instruments of sectarian oppression, and there is no reason to believe that Americans would use prayer as a way to offend their friends and neighbors after the passage of the amendment.

Some people would be offended. Some people are offended by the Christmas tree across from the White House, and some people were probably offended by the rabbi and the priest at the graduation I attended. Some people take religious objection to the Pledge of Allegiance to the flag, and the Supreme Court has held that their children need not participate in the pledge. The Reagan amendment provides the same guarantee with regard to prayer.

GOVERNMENT IS NOT BEING NEUTRAL

I hope that school boards can find prayers that offend as few people as possible. Though my child is a Catholic, there are many beautiful prayers in the legacy of King David and of King James that would enhance his faith and brighten his days. In some communities it may be more appropriate for children of various faiths to compose their own prayers, or to engage in a minute of silent prayer or meditation. Other communities would almost certainly choose to have no prayer at all. But the communities should decide.

Against the hypothetical abuses of school prayer by local authorities if the Reagan amendment passes should be arrayed the absurd lengths to which the federal courts have carried their constitutional rule against prayer. The courts have banned not only "official" prayers but also Bible reading, posting of the Ten Commandments on classroom walls, prayer meetings voluntarily initiated by students after class at times when other student groups were allowed to meet and school policies that allowed students to engage in a minute of silent meditation. One court even upheld a school principal's order forbidding kindergarden students to say grace before meals.

The continued enforcement of a nationwide rule against school prayer, and the erection by judges of higher and wider walls of separation between school children and God, is no way for the government to be neutral about religion. Ratification of the voluntary school prayer amendment would restore the spirit of the First Amendment, whose framers intended it to guarantee freedom of religion, not to impose a regime of freedom from religion in community life.

Senator DENTON. Panel No. 3 will be the Reverend Dean Kelley, staff associate for Religious and Civil Liberty; Dr. Jimmy Allen, president, radio and television commission of the Southern Baptist Convention; Dr. Charles Bergstrom, executive director, office of governmental affairs, Lutheran Council in the U.S.A.; and Mr.

Nathan Z. Dershowitz, director of commission on law and social action, American Jewish Congress.

May I ask Reverend Kelley to make his statement?

STATEMENTS OF REV. DEAN KELLEY, DIRECTOR FOR RELIGIOUS AND CIVIL LIBERTY, OF NATIONAL COUNCIL OF CHURCHES, NEW YORK, N.Y.; DR. JIMMY R. ALLEN, PRESIDENT, RADIO & TELEVISION COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, FORT WORTH, TEX.; DR. CHARLES BERGSTROM, EXECUTIVE DIRECTOR, OFFICE OF GOVERNMENTAL AFFAIRS, LUTHERAN COUNCIL IN THE U.S.A., WASHINGTON, D.C.; AND NATHAN Z. DERSHOWITZ, DIRECTOR OF COMMISSION ON LAW AND SOCIAL ACTION, AMERICAN JEWISH CONGRESS, NEW YORK, N.Y.

Mr. KELLEY. Thank you, Mr. Chairman.

We appreciate the opportunity to be included in this panel. We would like to try the experiment of each focusing on a different aspect of the issue.

Senator DENTON. I would appreciate that.

Mr. KELLEY. While reserving the right to pick up later anything that does not get dealt with in that fashion.

I have submitted my formal testimony and I will content myself with highlighting one aspect of it.

I am giving this testimony today on behalf of the National Council of Churches which has employed me for over 20 years in the field of religious liberty.

We contend, as we have on each instance when this issue has arisen in the House and the Senate, that it is unnecessary to amend the Constitution to permit prayers in public schools and other public institutions. While respecting the concerns of the proponents and sharing some of them, we feel that an amendment is unjust, unwise, and unnecessary.

PUBLIC SCHOOL PRAYER IS UNJUST TO RELIGIOUS MINORITIES

I would like to sketch the first aspect of that, why it is unjust, and why we look at it in that way. If you take a long perspective on the development of religious liberty among humankind, Senator, there was a time once, during most of human history, when everybody was required to belong to the One True Church, whatever that might happen to be in one part of the world or another. And, in fact, if religion changed, as it did in Britain when one ruler succeeded another, everyone was required to switch from one version of religion to another. And when one particular monarch took the throne, Queen Mary, a number of the leaders of the Church of England, such as Nicholas Ridley, Hugh Latimer, and others, were burned at the stake because they no longer qualified, they were no longer adherents to what had become the one true religion in that realm.

It was a great step of progress when you could leave the country, which many did upon a change of religion. And with the development of a number of nation-states in Europe, people who did not like the religion that the ruler required could move to the next

state. They could emigrate. That was better than being burned at the stake.

That is called territorialism. Whoever ruled, it is his religion that will prevail.

Now it was progress from that when William and Mary instituted religious tolerance, which meant that persons not adhering to the prevailing religion could, nevertheless, live in peace in the realm provided they would do so quietly and not object too strenuously to the prevailing form of religion.

All this time it was presumed that a nation could not exist unless its citizens shared certain religious commitments.

When this Nation was founded, a really radical experiment was attempted. Founders of this Nation tried a new thing in human history. They tried separating the religious commitment from the civil commitment. In other words, people of various religious commitments could equally be citizens of the same nation. They tried that, and it is not really clear yet, because it has only been in effect for a couple of centuries, whether it will work.

So the first amendment, in our view, epitomizes that institutional invention, that experiment in human liberty, where people can all be equally citizens without having to share the same religion or profess that they do.

In England there was a tactic called occasional conformity when, in order to qualify for membership in Parliament, you had to go, upon occasion, maybe once a year, to the Church of England and partake of the sacraments, whether you believed in them or not.

Now it seems to us that an arrangement which would permit local school boards and municipalities and even States to set up in public institutions certain forms of religious practice, specifically prayers, makes no pretense that they shall be nonsectarian. The Justice Department's analysis stipulates that someone will—public authorities will—have to determine what those prayers will be, even if it is only selecting teachers or pupils who will offer a prayer of their choosing, but someone will have to make that decision if there is to be a coherent corporate prayer. When that happens, persons who cannot share in that form of prayer in a public institution, which is as much theirs as the others, then become, to some degree, less fully citizens than those who share in the majority religious practice. They, as it were, will be guests in someone else's house or classroom for that period.

Now that, in our view, is an abandonment of the heroic experiment of the first amendment. It is a clear regression to territorialism because what is happening there is that a religious form becomes the dominant one, usually that of the majority—which is the "prince," the ruler in our society. The majority of the electorate will determine what the form of religious prayer will be in that public school or classroom, and those who do not conform to it have two choices: they can remain there quietly and not protest, not object, not disrupt the practice; or they can leave, that is, they can emigrate. It is a situation where the degree of their full belongingness to the civil society is impaired because of their nonconformity to a religious practice set up and authorized by the majority.

Now that, to us, is the vice of this kind of an amendment and many others like it that have been offered in the House and the

Senate, as has been observed. But they all have that in common, that they would regress to a form of submitting citizen's rights to local option, to territorialism, such as the first settlers of this country fled when they came to this country, to try to do an heroic experiment.

I would like to yield to other members of the panel.

Senator DENTON. Thank you.

Dr. Allen?

Mr. ALLEN. Yes, thank you very much for the chance to be here and share in this discussion of the issue of a constitutional amendment on prayer.

First, let me identify myself. I am the chief executive officer now of the Radio and Television Commission of the Southern Baptist Convention which is the Nation's largest evangelical group. I am past president of that convention. I am also chairman of the Americans United for Separation of Church and State and past president of that organization. It is a 100,000-member group which is dedicated to clarifying religious liberty in this society by helping to separate what church and state means through the legal processes of our society.

Since some of the proponents of this proposed constitutional amendment on religious ritual in public schools paint those opposing its passage as disbelievers in prayer or liberals in theology or secularists, I would like to begin my remarks by identifying my perspective on the issue.

I come as a theological conservative evangelical Christian. While there may be some voices arguing against the proposed amendment out of indifference to the prayer experience, I am not one of them. I argue against it out of that very concern for authentic and genuine expression of prayer. I think it is bad law which would produce either bland or bad results for genuine spiritual awakening in our land.

I speak here for myself. It is a cardinal principle among Baptists that no Baptist speaks for another. We see that two of your colleagues have spoken here today, both of whom are Baptists, Senator Mark Hatfield and our distinguished Senator from North Carolina, speaking on opposite sides of this issue, both of them coming out of our fellowship. We as Baptists do not speak for each other. We do not do that because we elect messengers rather than delegates.

I come thankful for my heritage both as a Baptist and as a citizen and recall the fact that religious liberty issues of our society have never been clearly defined. They have always been fought over, discussed. In the very beginning we talked about separation of church and state and Mr. Jefferson's letter to the Danbury Baptists. The fact is that James Madison was the author of that first amendment. He did it out of a deal he made basically at Madison Leland Park in Virginia where a Baptist preacher, John Leland, struck the deal because he was considering running against Madison for the Constitutional Assembly because of his concern for the persecution we felt and the necessity to guard religious liberty by some separation of the role of the state and the role of the church.

I have looked at this issue in a number of countries and I have come to a deep conviction that we have the right arrangement here

in our country and, as Mr. Kelley said, we are still working out the implications of it. But in the countries where religious passions are commingled with the state, there is chaos and where countries have sought to promote, sponsor, finance or mettle with religion, apathy is rampant. Officializing religion can only harm it. It is thus that I would like to urge you to reject the proposed amendment on religious ritual in public schools for two or three reasons. One is because the answer to the current confusion about free exercise of religion in public schools can be best worked out through the processes of constitutional interpretation rather than through amendment of the basic document. Do not amend it, interpret it.

There is confusion about what can and cannot be done in the free exercise of our faith within the context of public education. A great overreaction to the basic statements by the Supreme Court that governmentally composed prayers could not be forced on students has heightened this confusion. Both school patrons, boards, and administrations have been caught up in the process and some lower courts also have demonstrated similar mixed interpretations of the free exercise clause.

We are now caught up in a strange mixture of religious fervor on the one hand and religious insecurity on the other. Patience is wearing thin with the slow processes by which our society hammers out the applications of its basic guarantees of freedom. You as political leaders are particularly subjected to the emotional intensity of that process. Simple slogans and a simple response are politically expedient for some of us. However, this amendment will confuse far more than it clarifies. It will create more barriers to genuine religious expression than it eliminates. It will divide us more than it unifies us.

For a number of years those caught up in the battle of vigilance for freedom of religious conscience have, along with our society as a whole, largely concentrated on hammering out the meaning of the no establishment of religion clause of the Constitution. Religious groups bent on securing governmental powers of taxation for propagating their faith have created the necessity of such a process. The body of constitutional law interpreting the meaning of no establishment of religion clause has gradually evolved. It has been slow and often frustrating. But it ultimately provides healthy answers for a society convinced both of its commitment to freedom in diversity and to protecting the rights of religious expression.

Now our attention is being freshly turned to the meaning of the free exercise of religion aspect of the Constitution. Religious groups bent on securing governmental powers of compulsory education for propagating of their faith have created the necessity for such a process. We must define the legitimate expressions and explanations of one's faith within one's working relationship as an educator or a student. That process will be complex and difficult. However, it can be done and must be done. The point is that it cannot be done with this constitutional amendment.

To attempt to solve the issue of free exercise of religion in public education, as suggested in this amendment to the whole Constitution, is to use a sledge hammer and pick ax for an operation which demands a laser beam and scalpel. The amendment itself would create a whole new process for definition and constitutional law.

With as many as 2,000 religious expressions in our Nation, there are scores of definitions of prayer. Every law school in America would have to have a constitutional law course just on defining what prayer is and is not.

So we have created a whole new stream of constitutional cases if we go with this amendment, generalized as it is.

Second, I believe it is unwise because of the increase in sectarian strife that would be created by this amendment process and that that is counterproductive to the noble purposes intended by its opponents.

Increasing sectarian conflict decreases the quality of both religion and education.

Every effort has been made by the proponents of this amendment to choose words which would avoid conflict. But there is no cause or disclaiming sentence in the English language which will change the basic facts involved in this proposal.

Allowing for the prayer or religious ritual to be chosen by the majority of the community with due process of recognition of the exceptions present will not eliminate religious emotions creating sectarian strife. While some proponents of this amendment, living themselves in basically homogeneous communities, shrug off the implication of Baptist children being subjected to buddhist prayers or Mormon children being confronted by Roman Catholic ritual, I can assure you that the emotional conflicts in communities which will be aroused if this amendment passes is debated in every State legislature and is applied in diverse communities will be real and will be damaging to what we are really trying to provide in this society which is an atmosphere for spiritual awakening.

No clause or disclaiming sentence in the English language can remove the stigma and peer pressure on the child who chooses not to participate in the group ritual of religion other than his own. One of the things we need to hear is this is an educational process that this amendment seeks to change, not the processes that we inherited from the reforms of government in England where it was all—all of governmental activities began with an acknowledgment of God. There you do not have little children brought together under compulsory education laws with parental rights about what ought to be going on in the lives of their children. So we are really dealing with an inadequate illustration when we talk about the kinds of prayers that are being done in governmental processes and official activities over what is being done in an educational process in a school. I believe that this is an unwise approach.

The public school is already an endangered species in our land. Many are now questioning the wisdom of our decision to effect social change through the public education system because while some of these changes are commendable and desirable, the scar tissue of those conflicts on the educational systems themselves are apparent. For Congress to thrust this process back into the fiery furnaces of religious conflict by putting this issue on the agenda of every State legislature and every community may well make an early casualty of this new round of creedal strife the public school itself.

Therefore, I urge that we not accept this method of redressing this problem of how to define the free exercise of religion in our schools.

You have been called to examine this issue again and again and I believe that the public discussion of free exercise is healthy to our system. But the more I have examined it during these 20 years since the Supreme Court spoke on required ritual in public schools, the more convinced I have become that if we defuse this issue of its periodic emotional intensity and move through already tested processes, we can arrive at the understanding of free exercise of religion which will be best for the State and best for religion. This constitutional amendment would be a mistake rather than a solution.

Senator DENTON. Thank you, Dr. Allen.

Dr. Bergstrom, I note the arrival of Congressman Kindness from Ohio and if I might, I would like to ask him to take a seat at this table and to deliver any statement he cares to before we resume.

**STATEMENT OF HON. THOMAS KINDNESS, A U.S.
REPRESENTATIVE FROM THE STATE OF OHIO.**

Mr. KINDNESS. Thank you, Mr. Chairman.

I appreciate the opportunity to appear before the subcommittee and to testify with respect to the amendment to the Constitution which is the subject of this hearing.

I also appreciate Senator Thurmond introducing this amendment and causing these hearings to be held to open the discussion of an amendment.

Some of the discussion which has taken place already with respect to the proposed amendment to the Constitution to clarify the meaning of prayer in relation to government in our Nation illustrates just how broad the concept is that is under discussion; that is, the debate is much like prayer itself. A great many views are expressed and will be expressed and I think prayer perhaps has a most deep and personal meaning to everyone who adopts prayer as a practice or believes in prayer, just as people adopt various arguments for or against such constitutional amendment.

Prayer is an important part of the life and way of living of Americans of many religious beliefs. It is too important to remain in a doubt-filled legal status. The law of this Nation is presently burdened by a misguided series of judicial opinions which tend to lead this Nation away from prayer, away from religion, and away from morality. The very direction of the progression of those cases proves that those who are interested in promoting prayer and in promoting religion have not been very successful vis-a-vis the courts.

As President Reagan remarked upon the occasion of the National Day of Prayer, May 6, 1982, when he proposed this amendment, "Prayer has sustained our people in crisis, strengthened us in times of challenge, and guided us through our daily lives since the first settlers came to this continent." Even though we embrace a marvelous variety of faiths and practices, the historic importance of religion and the morality and values that such faith implies are deeply imbedded in our national character. And in our diversity there is great strength. We do not choose to force our values on

those who do not agree with us, but neither do we shrink from acknowledging our dependence upon a great power.

It is time to put the question to the States of this Union: Should the Constitution of the United States be amended by adding the following language and its words are beautifully clear.

Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any State to participate in prayer.

Changing the Constitution is not an easy task, nor should it be. I would be the first to object to any move to alter that great document for a trivial purpose. It is because I feel so strongly about this basic right of every person to communicate with God freely, as he or she chooses, that I offered this amendment in the House of Representatives.

If the Congress of the United States and the legislative bodies of three-fourths of the States should choose to support this declaration of that right, then I believe our Nation would be immeasurably strengthened. I agree with the President that it was the intention of our Founding Fathers that the right to pray be protected from governmental interference, not that religious tolerance requires us to remove prayer from our classrooms and public institutions.

I introduced House Joint Resolution 493 on May 25 of this year, and it has been referred to the House Committee on the Judiciary, where no action has been taken.

Two days ago a discharge petition was filed, discharge petition No. 20. When 218 Members have signed that petition, it will be placed on the discharge calendar where it must remain for 7 legislative days before it can be called up.

This is only to illustrate that the time is very tight in the House of Representatives, in the other body.

The first opportunity to consider this resolution on the floor will occur on Monday, September 13. Any Member who has signed the discharge petition may call it up on that date, after we get approval of the Journal.

This may sound simple, but it was not meant to be an easy way to legislate, and the time requirements are very stringent. I trust as this body will be proceeding with the constitutional amendment that we will be able, on the other side of the Capitol, to be proceeding concurrently, in parallel.

I think the debate that will ensue nationally can be nothing but healthy. We may differ without being difficult about it; but certainly with regard to a subject as important as this, we need to call upon our best intellectual resources, our best theological resources, the best legal resources. But the fact remains that prayer does not belong to the theologians, to the lawyers, to the legislators, to any particular grouping. Prayer belongs to us.

Mr. Chairman, I deeply appreciate the opportunity to present this testimony and commend the chairman for the work in proceeding with these hearings.

Senator DENTON. I shall pass that on to Chairman Thurmond and I wish to express for him and myself our gratitude for your time and your comments this morning.

Thank you.

Dr. Bergstrom?

Mr. BERGSTROM. It is good to see you again, Senator. I remember our discussion at Old Dominion University last fall.

I would like to shift gears a little bit for my benefit as well as everyone else's and suggest what is more helpful in the kind of discussion going on this morning. My remarks are being added to the record. For instance, as I have listened to the other two panels, I am more convinced that I am opposed to the amendment and to any effort to bring prayer into the schools.

REVIEW OF COMMENTS

Let me review some of the things that have been said.

Senator Thurmond talked about the Senate prayers. Obviously those are by adults who make that decision. A 6-year-old child in a public school, particularly if that is a minority child religiously, never gets that opportunity to decide. He described prayers as "values." That is the last thing many of us would want the prayer to become is "values." For us it is a personalized thing; just as children need to learn to drive automobiles they also need to learn about their faith in God from their parents and their religion.

Senator Helms spoke about a Mr. Murray. I would not want Mr. Murray or his mother to pray for my children any place; not that they are better or worse, but that their faith is different and could be disturbing. He also addressed the media, as I am sure they were well aware. I would like to address the same thing to the Senate and the church in terms of some humility in approach to this issue.

Rabbi Siegel spoke about the division between the church and state as a "hedge." A hedge is often filled with prickles and I think there is a clear definition that we ought to give to that. Church and state need to be separated institutionally. They can interact in all kinds of ways but we need to be very careful that we do not meld them together with a knockdown kind of hedge. I am sure that Mr. Murphy has read the writings of Brother Travers, a Catholic educator, who writes that when you are really gong to pray you need a basis of dogma and something that is related to your faith in God.

Mr. Dugan spoke about "truncated definitions" on the part of those who might oppose this amendment. I would like to read an old evangelical writer who would be 500 years old next year, Martin Luther, who says, "Where secular power presumes to prescribe laws for the soul, it encroaches on God's government and only misleads and destroys the soul." That is not truncated but deeply significant.

Mr. Denton, you spoke about prayer being "in the name of." I think all of us would agree with Mr. Kindness, that it is not only the theologians but to all of us to whom prayer belongs. "In the name of God" means in the spirit of God.

Mr. McAteer spoke about the "enemies of God," those who might disagree about school prayer and oppose the amendment. I plead that we do not use those kinds of terms as he was using. They have been used lately in mailings, and all kinds of judgments made

about people who may disagree. It will not do any good for either cause.

Mr. Jarmin twice spoke of prayers "of value reference." God help us if prayer becomes a value reference. I would like to hear some scripture references to support that. He said that wherever two or three are gathered together we are sure well aware that Christ's name is said. But it is only when they can gather together in the name of faith or their God that prayer can be meaningful.

CONCERN FOR PRAYER

Lutherans prepare statements and what you have before you is a representative statement of three Lutheran bodies.

I would like to acknowledge this morning the presence of Dr. John Houck, general secretary of the Lutheran Council. That is the umbrella group for which I work. I would remind all the Members of the Senate and this committee there are 40 offices like mine in Washington, D.C. You do not hear much about them. They do not have a great deal of publicity going for them. But many of them would have been here if they had had the opportunity. I cannot speak for them but what I can tell you probably comes close to this panel's testimony.

I am a born-again Lutheran evangelical Christian and therefore the scriptures mean a great deal to me. Theologically I do not see that relationship to morality and prayer. Some atheists have better morals than some people I know that call themselves Christians, particularly when it comes to areas of civil rights and deep moral compunction.

The God we believe in has two hands. One works for the salvation of our eternal soul. The other works for justice in this world. If you mix those two together and make judgments about people who are voting a particular way or saying certain things about prayer, I think that is an abomination to God and to the spirit of His ministry to His good world. There is nothing wrong with His world except when we mess it up, as we mess up Congress and mess up the church.

It is in that spirit that we need to develop a sense of godliness about what we do in education as every place else. There has not been a quotation from the teachings of Christ so far on prayer. I know it is in Dr. Kelley's written report. I would like to remind all of us that when Christ prayed he went alone to the woods and up in the mountains and said to pray in the closet. It was a personal reference to God. He could also do that with His disciples because they believed and worshiped together. I know Mr. Dershowitz will speak to the justice issue. But I want everyone to know that I believe God is concerned for justice, as He is for my eternal soul because all of the scriptures point that out.

The first amendment is not for the majority. We are doing fine and I do not see any great threats to prayer over the last 170 years. I see a free opportunity for people to worship and pray constantly, as they want, in the spirit of St. Paul who in many of his letters wrote about prayer being constant and unceasing. That kind of voluntary prayer has never been outlawed as you have heard many times this morning. So it is in that spirit that prayer to me be-

comes communion with God, deeply personal, and related to my faith, my particular branch of the church.

PRAYER AND EDUCATION

During my 12 years in school in Illinois (which is in the Bible belt) we never had prayer. The whole spirit of this I think indicates that prayer was not the bringer of God into public education. That I received in my church and from my pastors and teachers. It was St. Paul who said we do not know how to pray. President Reagan in his announcement about this prayer amendment said prayer is a powerful thing. He went on to say it cannot hurt a child. I do not understand the problem that everyone of us has if we try to define prayer in those terms.

It is constant; but every child that wants to organize a prayer group in a class it is going to disrupt that classroom. My sister has taught for 43 years, first-graders. She barely has time enough to teach the things she wants to and that she thinks are important. If we add so many things to education—which in itself is godly—we are going to distort and lose the opportunity of training minds in God's little children.

So I am interested from an evangelical point of view to protect my faith in God, that personal relationship for children where they can be so easily misled. I recently talked to a young Jewish man who grew up with a horrible experience in a Protestant neighborhood in terms of school prayers. Either to force him to say watered-down prayer or ask him to offer his own prayer was troublesome and ineffective as it is for Lutherans and, I am sure, for other people.

Polls do not help me very much in this regard. Usually there is agreement that, sure, it is nice to pray. Ask the question that the Americans United did a few years ago about accepting the fact that voluntary prayer is permitted by the Supreme Court decisions. Then do you want a change? The majority said no.

I would rather like to ask how we can be of help in considering the devotion of people, the personal relationship to God and the things that are being done in Christian education and public education. We are not a Christian nation. I would not want us to become a Christian nation because someone would have to decide whose Christian faith that is going to be. We are in favor of what the People for the American Way are talking about: The opportunity to differ, the freedom to be citizens as well as believers in God. All of us are human. I don't have any trouble about creation stories in public schools. I have not met any secular humanists, but I know that God somehow works through the process of people sharing their ideas, both in governmental and their faith in the church and its teachings and its prayers.

PRAYER AND CONGRESS

I would hope that Congress would try to help public education rather than take money away from it. Give it more money. Somehow we have come to understand the great need of all these opportunities to learn. You could learn as Members of Congress how much clergy and others do in public schools. As a parish pastor in

three New England cities, together with other church groups, I worked very closely with the public schools, helping them to understand where we are and what our faith is and what God means to us.

I hope we can give some time to the syndicated crime that is far more destructive than all the years we have not had prayer in the public schools or all the Supreme Court decisions. It takes away the freedom of any people in government to operate. If there is a great problem, it is syndicated crime that we need to turn our attention to.

I plead that you do not misuse the great wonderful freedom of the first amendment to muck it up or mess it up or change it. It is great. It is free and it has given me an opportunity to grow up in the Mid West, to be a parish pastor in New England, to appear before you as a pastor and to represent here this morning the Lutheran Church. That devotion I hope can be handed down to my grandchildren.

Thank you.

Senator DENTON. Thank you, Dr. Bergstrom.

Mr. Dershowitz?

Mr. DERSHOWITZ. Thank you, Senator.

My name is Nathan Dershowitz. I am the director of the Commission on Law and Social Action of the American Jewish Congress.

The testimony that we have prepared and submitted is on behalf of the National Jewish Community Relations Advisory Council as well as the Synagogue Council of America.

I think it is important to understand what those organizations are. The National Jewish Community Relations Advisory Council represents the 11 major national community relations organizations as well as 111 local Jewish community relations organizations.

The Synagogue Council of America is the national coordinating agency for conservative, orthodox, and reform rabbinic and congregational organizations.

I mention this because I think it is important to eliminate some of the suggestions that have been made earlier this morning. For example, it was suggested that those who are opposed to the amendment are antagonistic toward religion. The Synagogue Council of America recently noted its opposition to prayer in the public schools as follows:

It is significant that the Synagogue Council of America which represents the total American Jewish religious community—conservative, orthodox, and reform—opposes prayer in the public school. Clearly, we recognize the importance of prayer in the life of an individual and society. However, the first amendment of our Constitution wisely leaves to the individual and religious associations responsibility to determine the nature of religious beliefs and practices.

Our opposition to the proposed amendment is based fundamentally on a deep commitment to religious values and to the principle that such values must be espoused freely as an act of individual conscience. To people of all faiths, the purpose of prayer is spiritual communion with God. The home, church, and synagogue are the proper, time-honored places which provide the appropriate setting for a communion with God. There, religious yearning and the

needs of the soul can find satisfaction. Mechanical recitation of prayers in public schools, particularly prayers composed by government officials with a view toward popular acceptance, degrades these true religious experiences. It is harmful to the cultivation of the religious spirit.

Supporters of this amendment often erroneously complain that the Supreme Court's decision has banned prayer from the public schools and thus denies students who wish to pray freedom of religion.

All that is prohibited by the Constitution is officially sanctioned prayer. Purely private prayer, such as saying grace or any form of silent prayer or meditation has always been permitted. I have recently reviewed the three lower court decisions on that subject. We believe that, unless disruptive of school routine, such prayer is constitutionally protected. In the unlikely event that school officials bar private prayer, we would be quick to join in any legal challenge to that practice. The simple fact is that this is a nonissue.

THE CONSTITUTION, MAJORITY RULE, AND MINORITY RIGHTS

Whether the Constitution should be amended to permit prayer in the public schools is, without more, an important issue, meriting the most careful consideration, particularly since it is a portion of the Bill of Rights which is at issue. Indeed over 500 constitutional law professors and lawyers have already signed a statement circulated by us, urging that the Bill of Rights should not be tampered with.

But we believe there is an even more important principle at stake—that of constitutional protection for the rights of minorities. The Bill of Rights was added to the Constitution in the now classic words of Justice Jackson:

* * * to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to * * * freedom of worship * * * and other fundamental rights may not be submitted to vote; they depend on the outcome of no election.

TEACHING MORALITY

It is sometimes argued that prayer recitation and Bible reading somehow encourage a state of national and personal morality. This argument was described as "false both in theory and practice" in testimony given to this committee 18 years ago by Rabbi Joachim Prinz. He said at that time:

This argument for the amendment rests on the fact that the teachings of religion include ethical values and that religion has played an essential part in heightening and strengthening moral responsibility. This is true. Religion provides moral and ethical education. I question, however, whether "public school religion" can or ever has had that effect.

He described religious practices in Germany during the 1920's and 1930's, and he concluded by saying:

Did that program effectively teach morality to the German people? If it did it would be difficult to explain the rise of Hitler and the total moral collapse and even depravity of the German people, which resulted in the torture and death of millions of Jews and Christians.

THE MYTH OF "VOLUNTARY" SCHOOL PRAYER

The delusion of voluntarism is belied by history and recognized as a fiction by countless educators and other persons who know how children think and act. To a child in a classroom, no part of the school routine is voluntary. It cannot be made so by the cruel device of telling them that they are allowed to brand themselves as pariahs by leaving the classroom or by staying there and remaining conspicuously silent during a religious ceremony that reflects the faith of a majority of their classmates.

Abraham Lincoln was once asked how many legs a cow would have if you called his tail a leg. His answer was, "Four. It doesn't make any difference what you call a tail; it is still a tail." Calling this proposal a "voluntary school prayer amendment" does not make it so.

During the middle of the 19th century when Father Bapst, a Jesuit priest in Maine, advised Bridget Donahoe not to read the King James Bible, Father Bapst was tarred and feathered. A few years later Tom Wall, an 11-year-old Catholic pupil in Boston, was urged to say the Ten Commandments with the help of a 3-foot rattan stick, and in Indiana in 1880 a Catholic child was kept after school, day in and day out, in an attempt to break her will. And, even during the middle of this century, there are reports of a Jewish child kept in a closed wardrobe while the rest of the class was engaged in Bible instruction. Certainly we do not expect these kind of pressures to be exerted upon children in public schools today.

But it is clear from a review of what occurs now on related matters, that there will be tremendous pressure on children and the possibility of excusal does not render the religious practice "voluntary" or acceptable.

We, at the American Jewish Congress, are frequently asked for advice on how to handle difficult religious practice problems arising in public schools. I would like to describe four recent incidents, each of which, I can assure the committee, is reflective of other similar incidents and each of which involves the question of "voluntariness" or "excusals" in public schools.

The first occurred in a suburban community outside of New York. A school ran a Christmas program. The teacher, upon the assumption that a certain child's parents would object to the child's singing "Silent Night" and other religious hymns, decided to excuse the child from the program. The method used by the teacher was to stop the rehearsal when the children reached a religious hymn, ask the child to leave the stage, continue the rehearsal, stop at the conclusion of the religious part of the program and ask the child to return to the stage. This pattern was repeated throughout the rehearsal.

A second incident arose in New Jersey where a parent objected to a school program also around Christmastime. During the Christmas season not only was the art program Christmas oriented but all aspects of the educational program were geared exclusively to the Christmas season. A parent finally objected when the spelling list consisted of words like manger, Christ child, Trinity, Saviour, et cetera. An arrangement was worked out whereby the child

would not have to learn to spell Christ child, Trinity, et cetera. The difficulty, of course, was that there was simply no way for the child to know which words to study. The "excusal" solution was unworkable.

The third incident occurred in Texas, where students were invited over the public school loudspeaker to attend a pizza party after school. Attendance was voluntary. However, the students, upon entering the school after hours, discovered that the program was a religious program. The students were then prevented from leaving until the presentations were over upon the claim that once they voluntarily came they could not disrupt the program by simply walking out.

The fourth incident has been occurring with a degree of frequency that is most distressing. Certain religious groups are coming onto campuses, purportedly intending to deal and help with social problems that the children are facing. These are usually voluntary programs and only students who wish, need participate. I have been advised, however, of instances where these persons have told youngsters not to report what they are doing to their parents, upon the ground that part of the problem the children are having relates to the inability of parents to understand their problems.

A variation of that incident surfaced a few weeks ago in Oakland, Calif., where the principal and vice principal were reassigned amid charges that they allowed members of the Unification Church to conduct religious activities and recruit students at the school.

I suggest that each of these types of problems will multiply if we have prayers in public schools. Assume for 1 moment that this amendment passed, and we are in a classroom. The teacher, well-meaning and fully knowledgeable about the history of the amendment, announces it is time to pray. Does the teacher do what the teacher in Tennessee did, namely state: "The class will now pray except for Sam who is Jewish and Muhamed who is a Muslim?" Or does the teacher wait to choose who will lead the prayer and then dismiss certain children? But how does the teacher know who to dismiss?

The most threatening aspect of the proposed amendment is that sectarian prayers can be given. Leaving aside for the moment the impact of that change on America's tradition of religious toleration, the change poses practical problems. Does the teacher preceptor the prayer and excuse Catholics when prayers from the King James version of the Bible are chosen, and Protestants when prayers are from the Douay Bible, and Jews when the prayers are from the New Testament; and Jews and Christians if someone happens to choose the Divine Principles? The invitation by this amendment to have sectarian prayers is a serious problem. The most widely used prayer, the Lord's Prayer, in addition to appearing in different versions within the Christian community, is entirely unacceptable to Jews for reasons stated in a resolution adopted by the Synagogue Council of America in 1963. It is said in there that:

The prayer is taken from the New Testament, the basic source of Christianity. The designation "Lord" used in the title refers to Jesus, whom Christians regard as "Lord." Eminent Christian authorities, both Catholic and Protestant, insist on the distinctively and uniquely Christian character of this prayer.

Accordingly, this prayer is of a sectarian nature and should not be recited by Jews.

Supporters of the pending proposal deal with this fact by ignoring it. Thus, the President's questions and answers say:

The Lord's prayer and the Ten Commandments are reflections of our Judeo-Christian heritage that could not fairly be described as instruments for the imposition of narrow sectarian dogmas on schoolchildren.

This ignores the fact that the Ten Commandments are expressed, and even numbered, differently by various sects and, as we previously noted, the Lord's Prayer, in addition to appearing in different versions within the Christian community, is entirely unacceptable to Jews.

In conclusion, I should note that the Supreme Court decisions barring official prayer in public schools do not prevent children from offering whatever prayers are prompted by their consciences or the teachings of their parents. And 20 years of experience show that those decisions have not undermined America's religious faith. On the contrary, they have stood as a reminder and symbol of the freedom of conscience that is America's proudest tradition—a freedom that has itself protected and fostered religious faith.

Religion does not need, and should not have, the sponsorship or support of Government. More broadly, we insist that religious practice should never be made a matter of majority decision. The faith of Americans has been kept strong through the home and the church and synagogue. It will continue to be strong if it is kept free from Government intermeddling.

Thank you.

Senator DENTON. Thank you very much.

For the sake of accuracy here and an attempt to preserve a reasonable and mutually respectful mood as we approach this highly controversial subject, and one which we must deal with infinite care, and—I think we all agree with this approach, let me state my agreement with some of what has been said by those who oppose this amendment. The violations of human dignity which have been imposed throughout history are legion. There is no question about that. If one were to deal with one major religion, say Christianity, there have been a number of wars among Christian nations, often over unjust causes with tremendous loss of life and great suffering. There is no question about that.

One answer which is sometimes given deals with our own human frailty rather than with the validity of religion. In the case of Christianity, it has been said regarding those wars among Christian nations—in the Spanish inquisition and the persecution which took place on this continent before this Nation was formed, and which has taken place since it was formed—one could suggest that there is nothing wrong with Christianity. It is just that it has never been tried. Perhaps the same thing could be said of Judaism, Islam, Buddhism, or the other principal efforts of man to aspire to that which St. Paul referred to when he said that the proof of your faith is the voice within you which cries out "Abba," meaning Father. St. Paul did not say that this is a reasonable indication that your faith may be valid. He said it is the proof of faith. Of course you do not have to agree with him.

I have read of experiences of others, and have myself personally experienced incidents in my life in which the greatest reality was the knowledge that there was a voice within me crying out "Abba." It seems to me we may be getting away from the basic question, which is whether or not we should prohibit the acknowledgment that such a voice is within us and that this Nation, one nation under God, should prohibit some sort of prayer in public schools and institutions.

There are tremendous pitfalls, some of which are not so obvious and many of which have not yet been unearthed by the great care of the opponents to this amendment. I have been able to think of perhaps a dozen more problems. I hate to mention one example. What is religion? One can talk about the various obscure religious issues without ever resolving them. So there are many cobwebs which we have to sort out here. But I hope we do it with good will and I hope we do it with commonsense.

I have heard a great deal of emphasis about distortions which the Supreme Court decisions have produced. I could read a series of Supreme Court decisions which indicate that, since the early 1960's they have been very different from previous years, particularly with respect to lower courts. Mr. Dershowitz mentioned that it has never been questioned whether one could say grace. Well, in one case, a school principal's order prohibiting kindergarten students from praying silently was upheld. That is one example in the years following *Engle* in which the Supreme Court decision has been distorted at the lower levels of authority.

That one example in which the students were prohibited from saying grace before meals seems to differ from Mr. Dershowitz's view.

Mr. DERSHOWITZ. Senator, if I may, *Stein v. Oshinsky*, which we are talking about, offered organized prayer activity. There is no question in my mind—there is no case I know of, and I believe I have reviewed all of them, which would stop you from calling out Abba, personally, privately, in the classroom. We are talking about a State-sanctioned and State-organized activity.

Senator DENTON. I am not addressing my independent right. I am addressing your right and the right of three kids who sit down to a table and I have sat down and prayed with people of all faiths. I have done this in Singapore, with every color, with every race. That would be an example of organized prayer in a public school, at least in that particular case.

Mr. DERSHOWITZ. The case of *Stein* was a situation where there was a demand on the part of the parents that the children be allowed to continue with a certain kind of religious practice namely, all sitting down in the morning and saying a prayer before they ate their cookies. That is different from what we are talking about and that is the furthest case we have. I do suggest, Senator, to reverse a long history of first amendment interpretations on the basis of lower Federal court decisions is an extreme effort on the part of Congress. All of the examples that have been raised today, for example, the *Brandon* case, or the *Lubbock, Texas*, case are lower court decisions. The normal process would be to wait for the Supreme Court.

Senator DENTON. We have listened to a thesis which seems to indicate that we are reversing ourselves, that we are going back on an original commitment or set of practices within the United States at its founding and before its founding. I am not a lawyer—and I was only asked last night to chair this hearing so I ask you to bear with me as I pose questions.

Prior to the 1960's the Supreme Court ruled that in every and all respects there has been a separation. With absolute separation there can be no concert. That is the commonsense of the matter. Otherwise the State and religion would be aliens to each other, hostile, suspicious, and even unfriendly. Justice Douglas said that in a free society, religion and Government must necessarily interact in countless ways. Let me at least let you know where I am coming from in my disposition toward this question. I more than welcome and solicit your comments to me after this hearing in writing or any way you wish.

Regarding the voice within crying out, if you have read any incidents such as in the 1960's an oil rig which fell into the Gulf of Mexico in the 1960's, you know that five or six roustabouts, who probably had not been to church in 60 years and may have been leading wild lives, suddenly got religion as the water lifted up and they started to get exhausted of air.

I have been through a similar experience, although I had faith before. I had this: That faith became knowledge in the sense that there was no further question. I knew the voice within me crying out Abba was more valid knowledge than what I thought my name was or that 2 and 2 are 4 and I believe that all of you share that.

I am coming from there and I am also coming from the belief that whereas you are quite correct in pointing out the malapplications of religion against the role of God and the suffering which it has caused, from Joan of Arc to the witch hunts in Salem to the antipathetic attitudes toward Jews—let me give you another example. When I was a kid I studied the Maryland Colony's very liberal policy with respect to religion. As you well know, Roger Williams had to flee Massachusetts. Most colonies were based on religion and this is well before we formed a nation. We did recognize that, within our own continent, that which became this Nation there was great persecution of man in the name of religion. Some scholars got together and dealt with this in the Encyclopedia Britannica. These British writers wrote contemptuously about the United States, until they got to the founders of this Nation. Then they said that never before in history was there a better qualified group. They addressed these questions we are addressing except in much greater depth than we are and they came out with a declaration based on the pursuit of happiness, which is the culmination of those inalienable rights endowed by our Creator.

That is what I am after. I cannot see the chaos that has resulted. We have progressed from where this Maryland Toleration Act said anybody in the Commonwealth of Maryland, be it Catholic or not, may be free from fear of persecution. I thought that was beautiful. I have since come to learn that I did not notice the footnote which said that anybody who did not practice the Catholic religion would be prosecuted. As a Roman Catholic I have waited 200 years for there to be a Roman Catholic Chaplain of the Navy. I have seen

and fought against persecution of blacks and Jews and anyone else. I may be wrong but I am not intolerant of my fellow man.

Mr. BERGSTROM. I never heard that, sir.

Senator DENTON. That is what you hear on the television and radio. I have been portrayed as being in favor of capital punishment for adultery and a few other things. I am not. I am for less chaos, more justice, and reminding ourselves occasionally that there is a guide. We are not reversing ourselves. It was the Supreme Court which reversed time-honored practice.

So we are not reversing history. We are talking about an anomalous period in our country during which I was mostly in prison. When I came back I went into culture shock, some of which I do not intend to recover from. I will not adapt to some of these anomalies. I would go along with any of you with respect to behavioral principles.

In conclusion to my statement, and I will ask your remarks, we have talked about the United States of America and we have talked about religion. Let us remind ourselves that mankind has been on this Earth for millions of years, in an uncivilized state for most of that time. Indeed, if you would take a piece of string from the top of the Washington Monument and string it to the Capitol and say this represents the duration of mankind on Earth and then mark off on it a corresponding measure of civilization's history, it would be about that big on that line.

Where did civilization come from? It came from the development of family and agriculture. Before that you did not have either and you could not have civilization. Where did you get the sense of civil discipline required for a man to stay with a woman long enough to raise children rather than to drag her into the cave, use her, and throw her out? Such civility was not present until man had religious beliefs. Until man had some kind of faith, communities could not be formed.

As a Christian I believe that the Jewish faith provides such civility. It could be the Muslim faith. It is just belief. But I have no difficulties with respecting the way one respects God. I believe there is a tremendous commonality of understanding, not just from that voice but from which it legally emanates in the Old and New Testament or in the Koran. That is the key to our success as a Nation. Imperfect as we have been, this question needs to be addressed carefully to remind ourselves that we might be establishing religion, and if so, ask ourselves if this is something that we want to do. Maybe the constitutional amendment is not the right way to go. I tend to think it is.

THE PRAYER ISSUE IS AN INSTANCE OF CULTURAL LAG

Mr. KELLEY. I think you are talking our language. We resonate to what you are saying. I want to comment on the historical perspective you mentioned, which is very consonant with what I was saying. In this Nation we are trying a very recent experiment and we have not all caught on to how it works yet, including the Supreme Court. You quoted from Mr. Justice Douglas in the accommodation decision, the second released-time case, I believe, *Zorach v. Clausen* in which he expressed one interpretation of church-state

relations that was a little different from what preceded it and what followed it. The Court has had at least three successive tests of establishment, the no-aid test, the accommodation test and then the three-part one which is now apparently in effect, because the Court is still trying to grapple with how complete nonestablishment of religion works.

I think the situation you described prior to the 1962 decisions, some, but by no means all, States had prayer in public schools. Mine did not. My State of Wyoming. That may be why I am up here today. During the 180 or more years of the history of this country after the adoption of the first amendment, which set up a new condition of religious liberty, rather than just religious toleration, we were all trying to get used to what that meant, and in a sense it was not until 1962 that the Court had brought before it a case which enabled it to try to suggest and rule what it meant in a public school classroom and the effect upon the full citizenship of some children and their families if that public school had religious practices that were not acceptable to them.

Now I think that is also the explanation for the large public opinion poll majority supporting a prayer amendment. It is an instance of cultural lag, we are all mentally still living in many respects back in the age of toleration instead of in the present age of true religious liberty.

Senator DENTON. When was that age of toleration?

Mr. KELLEY. From William and Mary up to the first amendment.

Senator DENTON. But the Maryland Toleration Act was in that era of toleration and it was not very tolerant. The Maryland Toleration Act occurred in that time frame. The first amendment had not been written. She was earlier. Yet that act was the most tolerant of all in our colonies.

Mr. KELLEY. Except, as you say, it provided for the death penalty for those that did not subscribe to Christianity. It was not until after Maryland was a State that the Maryland Jew bill was passed, which first extended full citizenship to Jewish citizens of that State. So there was a little cultural lag there too. The provision for execution of non-Christians in Maryland would then be a cultural lag from the period of no toleration at all. It takes us a long time to live out what a new institutional invention means, and I think that is what we are struggling with here.

Mr. ALLEN. I resonate with your wanting for spiritual reawakening. I sense it is coming. The question I have about this is whether or not the kind of formal required routines that we are talking about are an inoculation against the kind of spiritual thing that you are talking about, that I am talking about, or whether the nailing down of external symbols will satisfy and actually stultify the kind of energy that we are now feeling in many of our religious groups moving in our country. I have a question about that. I also have a question about the free exercise side of the matter in public education, as I indicated. I think we are still hammering out what that means and I do not think that that is best debated in a constitutional amendment on a particular voluntary prayer issue. I think we do need to create the court cases. We need to be alerted to find a way to argue them through the courts as our system calls for and find out how the expression of faith and the sharing of the faith

and the experience in faith relates to this time when we are called together by law. But I have a great faith in faith. I think the spirit of God will let us have a spiritual awakening without having to use the forces of Government to make it happen.

Therefore, I think we really may be equating a situation that was generally in the society with a particular practice that was in some sections of our country. Actually, the required prayer in public schools was practiced more in the South and New York and one or two other spots in our country rather than clear across it. I think we may be equating that experience that many of us had, I did not happen to have it, but that we equate that with a general spiritual strength of our country religion in our country, and I really believe—of course after this point I am talking about Maryland, I would like to talk about Rhode Island. Baptists were the first folks and Roger Williams sought to have a geographical place in the world where freedom was absolutely guaranteed in the faith of religion. I believe, because in our tradition we believe, that you do not coerce people to faith, but that is not the healthiest kind of faith. I do not believe that tacking into this a routine prayer, a ritual, produces the kind of thing that you are yearning for and I am coming from.

Senator DENTON. If I were coming from your environment, perhaps I would agree with your view. I am coming from a different perspective which includes exposure to all forms of government policy. I have been watching this morality business in the media. I am a libertarian but here in Washington I see a need for some kind of symbol that Congress and the Government are oriented like our citizens with respect to this belief in this voice within that cries "Abba!" I see concrete manifestations across the board in our policies which are going the opposite way, inculcating values opposed to such recognition and therefore I want to see a symbol, carefully crafted, which will permit recognition of this aspect of human experience. I do not argue with your historical distinction.

Mr. ALLEN. One of my points of view is the way to do that is to apply that spiritual energy in principle, in law, rather than in symbol.

Senator DENTON. It would be more than a symbol. It would be—

Mr. ALLEN. I am committed in my own ministry to working in the media basically because of my conviction that the media needs it as much as we need it, insights of religious conscience and religious values. But the thing that I think we need to keep in mind is we are talking about a compulsory situation for a little child and that is a different thing.

Senator Denton Are you saying the word "compulsory" is in this?

Mr. ALLEN. You bring them into the classroom and make them say yes or no.

Senator DENTON. But if they know that is going on every morning, the teacher would not have to know. The child will know. The parents will know. I admit that is getting down to the nitty-gritty. I do not want anybody to be forced. I share your concern that it might have this impact but I am as insistent as you are that it will not.

Mr. BERGSTROM. Thank you for the sermon, Senator Denton. It is better than the one I heard last Sunday, which was my own.

In all seriousness, I think one of the most important things that could happen in the interaction between church and state would be that there can be more opportunity—aside from hearings and formal votes—where there could be this kind of discussion. I thought of a couple of things while you were speaking. One is the matter of the first amendment and the religious leaders you spoke about. They wrote the first amendment knowing full well that there would be people who would want to do more, add to it, and somehow get a symbol; it is that point we are talking about this morning. I would like to say that in addition to your concerns, I have a concern for that secular world. It is not true that everybody who says they are holy or moral is necessarily so; we have to make sure we keep the issues clear. I have listened to an Indian yesterday morning in a mixed group of people. When the Indian got through praying he said, "You took away our children and put them on the reservation." Our prayers to them therefore do need defining. As Christ said in His story of the final judgment, it is not what you prayed but did you do it, and that balance is what we are trying to look for this morning.

Senator DENTON. Before I go to Mr. Dershowitz, let me say, I am not ignorant in international affairs and history and I am very uncomfortable with the degree to which our Government at its top has officially separated itself from the acknowledgment of a supreme being especially when I look at Adolf Hitler, Joseph Stalin, and those governments which totally strangled such beliefs. I lived in a society for 7½ years in which ostensibly you could have a Catholic priest and a Jewish rabbi. Maybe you could. But, buddy, you had better toe the line. They really were not in the business of compassion or loving their neighbors. Those people I sympathized with more were my fellow captors. I loved them. They practiced their religion surreptitiously because of their government. That is what Sakharov is trying to tell us. That is why Solzhenitsyn will not answer his mail. He says we are missing the forest for the trees. We are not discussing the trees and we must discuss them. There is a forest and we must look at the nations that have separated themselves to see the possible consequences of our present course.

Mr. DERSHOWITZ. Earlier you had separated the historic practices from the concept of Thomas Jefferson, and I think it is an important distinction. As a Jew, I would certainly not want to go back to the 18th century and all of the historic practices of the 18th century as they applied to Jews—to take a look at what was done then and say since it was done then it is acceptable now, is unacceptable to me. What is important is the underlying concept and principle.

With respect to that, you did raise a question about Jefferson, and I think if you look at the history, you will see that Jefferson's letter that he sent to the Danbury Baptists was very carefully prepared. As a matter of fact, if you look at the history, it is clear that he had that test evaluated by the Attorney General before it was sent, and he indicated that it was an opportunity that he had been looking for, to send that letter, and that he finally found the opportunity and sent this carefully prepared document cleared by the

Attorney General. But, in addition to that, the suggestion seems to have been made that the wall of separation between church and state has only been implemented since McCollum. But if we take a look at some of the Supreme Court decisions, we will see, as early as 1878, in a unanimous opinion by Chief Justice Waite, there was an adoption of the Jeffersonian reference to the Danbury letter and an indication that Jefferson's view of the separation of church and state is an appropriate reflection of the historical concept, that we are talking about, of separation of church and state.

Let me just make one other point and that is—

Senator DENTON. Then you believe, if I may interject here, that Supreme Court decisions before 1960 were in error and should have been in accordance with your interpretation of—

Mr. DERSHOWITZ. I am sorry, I did not understand. What I am saying is, it is not a new concept. It seems to me the suggestion made earlier today that the concept of a separation—that a wall of separation between church and state was a doctrine which—first articulated by Jefferson, evaporated and then suddenly was, to use the expression, resurrected in 1962. I am saying to you that is simply not the case.

Senator DENTON. For your information, you have read the President's statement on that but he says considerable reliance has also been placed on Jefferson's statement made 33 years after the amendment was drafted, that the establishment clause was intended to erect "a wall of separation between church and state." Justice Stewart has noted that phrase is nowhere to be found in the Constitution. Jefferson's statements involve a powerful way of summarizing the effect of the first amendment, "clearly neither a complete statement nor substitute for the words of the amendment itself" and that is the important part. Moreover, Jefferson's subsequent writings which reflect his belief that nonsectarian religious exercises should not be totally excluded from public education, belie the absolute effect which some have thought to give these words. That is the lever around which the argument goes.

Mr. Dershowitz I would like to go through the White House memorandum line by line and demonstrate what I think are the numerous inaccuracies, whether in terms of the history, whether in terms of the interpretations of the cases, the citations to the one dissenting Justice, during a period of time, as if he was the only one that knows how to interpret the history. I think there are many, many, many inaccuracies within that White House memorandum.

But the final point I would like to make is that I find the suggestion that we need a symbolic gesture extremely distressing. That is, the organizations I represent and virtually all, if not all, major Jewish organizations are fundamentally opposed to this amendment and the idea of having a symbolic gesture at this time which undercuts an interpretation of the first amendment, which we have been very happy with, is something I find distressing. I do not like symbolic gestures under any circumstances. I certainly do not like a symbolic gesture which takes the first amendment and turns it on its head.

Senator DENTON. I do not mean all this amendment would be is a symbol. I meant it would be a monument to a change which has been drafted rather recently in another direction.

Do any of you agree with Senator Hatfield that banning voluntary Bible studies before or after school, without official supervision, is unacceptable?

Mr. ALLEN. I certainly agree with that. That brings to the point the thing I was trying to say about taking the cases, creating the situations, answering them within the constitutional body of law. That is an error in the lower court that needs to be addressed and that is there are ways in the society for doing that and that I doubt if this constitutional amendment would address that.

Mr. KELLEY. In fact, the Supreme Court said that at the college level religious organizations are entitled to the same provisions that nonreligious student organizations enjoy: The National Council of Churches entered a friend-of-the-court brief in that case in the Supreme Court urging precisely that outcome. If one of these lower court cases on voluntary student activities in elementary schools were also to come to the Supreme Court, I think the National Council of Churches would likewise support the right of pupils—other than in school periods and under teacher supervision—to meet before school or after school or to do anything that is truly spontaneous and voluntary.

Mr. BERGSTROM. The Lutheran Church talks about education and the teaching of religion, which we would like to stress, and that is what I meant by many clergy across the Nation helping in schools.

Senator DENTON. There are many that are concerned that we are already teaching values and we are having value clarification courses which are inimical I believe to your goals. To keep ruling out one thing and letting all of that increase bothers me. I have to deal with it on committees on which I serve.

Mr. Allen could you explain the reason why the National Convention of the Southern Baptists Convention voted to support voluntary school prayer in view of your dissent?

Mr. ALLEN. I went into that in my statement. The fact is we have an individualism about the way we deal with things in which messengers are elected. That means that the messengers in that particular meeting—we have had three other times when the messengers voted against this idea. This year they voted for it. That is why when I was saying this I said I speak for myself because all Baptists speak for themselves rather than each other. There was a vote in which the convention did indeed vote to approve this idea this year. There have been three previous votes in which that group of messengers voted not to approve that idea. So you will have to accept that as a part of our Baptist pluralism.

Senator DENTON. I have admired the logic and the good will behind your testimony this morning. This dialog need not be closed. We will leave the record open for 3 days in the event you receive questions that you would like to respond to within 10 days of their receipt.

[The prepared statements and submissions of Messrs. Kelly, Allen, Bergstrom, and Dershowitz follow:]

PREPARED STATEMENT OF REV. DEAN M. KELLEY

My name is Dean M. Kelley. I am Director for Religious and Civil Liberty for the National Council of the Churches of Christ in the U.S.A. and have held that position since 1969. I am an ordained minister of the United Methodist Church and have served local parish churches for 13 years before coming to the National Council. I have been assigned by the President and the General Secretary of the NCC to present this testimony on behalf of the NCC.

The National Council of Churches is the cooperative agency of thirty-two Protestant and Eastern Orthodox national religious bodies which have an aggregate membership of over 40,000,000. We do not presume to speak for all of those members any more than a Senator can speak for all of the people in his state. We speak for the Governing Board of the NCC, a representative body of about 300 persons chosen by the member denominations in proportion to their size and according to their own respective processes. This testimony is based on a policy statement of the NCC, "The Churches and the Public Schools," adopted in 1963 and reaffirmed by a resolution on "Prayer in Public Schools" adopted May 13, 1982. (The Greek Orthodox Archdiocese of North and South America dissented from this policy.) Copies of these are attached.

SUMMARY

The National Council of the Churches of Christ in the U.S.A. opposes the amending of the Constitution to permit prayers in public schools and other public institutions. While deeply respecting the sincere concerns of those who support this proposal, the National Council feels that such a constitutional amendment is unjust, unwise and unnecessary.

I.

It is unjust because it makes the rights of members of

religious minorities dependent upon the self-restraint of religious majorities, a condition the First Amendment was designed to prevent. The First Amendment was a heroic experiment in religious liberty, an institutional invention unique at that time in world history but since imitated in many lands. For the first time in human affairs, the Founders of this nation created an arrangement in which the civil covenant binding the inhabitants into one nation was to be independent of the religious covenant(s) by which they undertook to serve God according to their several faiths.¹

Instead of trying to insure national unity by insisting that all inhabitants profess the same religious faith, the Founders conceived that all could be equally citizens irrespective of their religious commitments. As the Virginia Statute for Religious Freedom, a forerunner of the First Amendment, puts it:

...no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested or burdened in his body or goods, nor shall otherwise suffer on account of his religious opinions or beliefs, but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge or affect their civil capacities.²

This was an important step beyond the arrangement prevailing in Europe, a condition of religious toleration, in which members of minority religious groups were permitted to coexist with the majority on the condition that they conform to the dominant or established faith -- or at least make no outward show of non-conformity. But it was clear that they were accepted on sufferance only; they were guests in someone else's house, to be admitted only on condition of good (religious) behavior. They were not fully citizens because they did not share the religious commitment expected of all loyal members of society. Because they did not share that religious commitment, their civil loyalty was suspect.

Toleration was a relaxed form of the arrangement that came to dominate Europe after the Protestant Reformation: cuius regio, eius religio. Under this principle, the religion of the ruler became the religion of his realm, and those who didn't like it were free (or sometimes required) to

emigrate. (That was an improvement over the pre-Reformation situation where religious non-conformers were burned at the stake, but it still left much to be desired.)

What the proposed amendment would do would be to abandon the American experiment of the independence of the civil covenant from the religious covenant and regress to the European situation of toleration and cuius regio, eius religio, except that in this society the ruler is the majority of the electorate. The majority would rule in the religious forms to be instituted in public schools and other public institutions. Members of religious minorities, who are equally citizens and whose taxes equally support those institutions, would no longer be equally at home in them. They would be guests in institutions belonging more to the (religious) majority than to them, second-class citizens because of their religious non-conformity.

But are a few non-conformists to be able to veto the wishes of the majority? In most things, no. The majority will rule on the levying of taxes, the building of schools, the regulation of traffic and business. But, as the Supreme Court profoundly stated in West Virginia v. Barnette:

"The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."³

The Justice Department's interpretation of the President's proposed amendment makes no bones about the universal acceptability or non-sectarian character of the prayers that would be admissible if the amendment is adopted. It says:

"If groups of people are to be permitted to pray, someone must have the power to determine the content of such prayers."⁴

"Public authorities should have the right to conduct public prayers for those who desire to participate...."⁵

(This is certainly a more realistic approach than supposing that any prayer can be truly non-sectarian, since a lowest-common-denominator prayer would be unacceptable to devout Christians if it did not include the name of Jesus Christ.)

Though the Justice Department carefully couches its exposition in terms of "permitting" people to pray, the references to "power to determine the content of such prayers" and "public authorities" having "the right to conduct" such prayers make it clear that the occasion will be something other than spontaneous popular enthusiasm for public prayer. It will, understandably, have to be planned, scheduled, "determined," "conducted."

By whom? Not by individual children suddenly expressing the wish to pray, but by "public authorities": teachers, principals, school boards, states. This is not merely "permitting" people to pray, this is the state arranging for people to pray, and to pray prayers selected by the same authorities, even if it is only inviting a participant to offer prayer on behalf of all.

So there is no pretense that it will be non-sectarian prayer. It will be a prayer more acceptable to some than to others, which is the meaning of "sectarian." We may hope that prayers of various faith-traditions might be used in rotation, but there is no assurance that a few Jewish pupils might not have to hear Christian prayers offered all year round in the public schools that are supposed to be as much theirs as anyone else's.

Some may say that this can surely do them no harm. But that is for them to say. Such an assurance is like a fat man leaning on a thin man and telling him it doesn't hurt. Orthodox Jewish children are taught that prayer must be made in certain postures, with prayer-shawl, head covered, etc. What would be undertaken in public schools would not be "prayer" for them, but a travesty of prayer as they understand it.

The solution for them, we are told, is to be excused. "No person shall be required by the United States or any state to participate in prayer," the amendment says, and that provision is designed to cure all ills that might arise. But what does it mean? Are there pressures and expectations that do not rise to the level of state-imposed "requirements" that still might have a strong adverse effect on impressionable children? How about the teacher's using a

sarcastic or scornful tone of voice with excusing those who wish to be excused from classroom prayer? How about the incredulous questions or derisive taunts of fellow-pupils? How about having to stay after school each day to "make up time" spent out of the classroom during prayer periods? How about voluminous penmanship assignments to copy sentences like "Christmas is Christ's birthday" or "Prayer changes things"? (That was an actual experience reported on a TV call-in show).

And how about the teacher? Is the teacher not to be "required" to participate in prayer? And what will be the attitude of a teacher who does not understand or appreciate prayer but is told that it is part of the teacher's responsibility to "conduct public prayers"? Will the teacher have a favorable or reverent attitude toward that activity? Will the children in the classroom not know what teacher's attitude toward prayer is?

Even if we suppose that no subtle pressures are applied to encourage conformity in public prayer, the provision for excusal is itself the tell-tale throwback to an earlier age. It tells the religious minority, "This is our classroom, where our religion prevails; if you don't like it, you can leave -- (~~emigrate~~). You can't stay here and be a full member of our civil community unless you conform to our religious practice (or at least endure it in silence)." It is a clear regression to cuius regio, eius religio, with all the misery that has produced through several centuries.

But we are told that no such problems troubled the American classroom prior to the Supreme Court's (mis?)reading of the First Amendment in 1963. All was supposedly sweetness and light when the several states, and indeed each local community, could set its own standards for religious practices in public-school classrooms. But that is -- unfortunately -- not true. The record is replete with stories of children made to suffer because they would not conform to religious practices in public schools. A Massachusetts case in 1859 involved a Roman Catholic boy of eleven, Tom Wall, who, acting on instructions of his parents and his priest, declined to confire

to a classroom religious practice. He was whipped on the hands with a rattan stick until he consented to conform.⁶ In some states, litigation led to the elimination of prayer from public schools long before 1963. It was a fertile field for community strife and litigation, and courts reached diverse conclusions, sometimes upholding the practice, as in the case of Tom Wall, cited above. Thus the establishment of religion -- in this respect at least -- had come to have a different meaning from one jurisdiction to the next.

But that is not what a federal Bill of Rights should permit. How many of us wish to submit our most precious rights and liberties to local option?

II

The proposed amendment is unwise because it would authorize practices in public schools that would permit government intrusion into a realm sacred to the family and the church and also do a real disservice to what we understand to be genuine Biblical faith. As the NCC resolution states:

WHEREAS, the recitation of prescribed non-denominational prayer demeans true religion by denying the traditions of faith groups while imposing on some children religious practices which are offensive to them;...

THEREFORE, be it resolved that the Governing Board of the National Council of the Churches of Christ in the U.S.A.:

Reaffirms its belief, as set forth in the Policy Statement on "The Churches and the Public Schools," that "Christian nurture and the development and practice of Christian worship are unescapable obligations of the congregation and the family;" and

Reaffirms its support of the Supreme Court language describing the First Amendment as providing no role for government in prescribing or providing for prayer in public schools.

Prayer in public schools is a custom characteristic of a homogeneous community and nation, but ours is no longer such, and it is unwise to pretend that it is. For better or worse, it is religiously pluralistic, and the 1963 decisions of the Supreme Court were a belated recognition of that fact.

The President of the NCC, Bishop James Armstrong of the

Indianapolis Area of the United Methodist Church, has emphasized this reality in a statement which he prepared to be included in this testimony:

I am a Christian. I pray for the coming day when my country, the United States of America will be a Christian nation. By that I mean I pray for the coming of a day when the values, ideals, spirit and commitment of this nation will reflect those of the Man from Nazareth. Yet, even as I write this, I realize that these words mean different things to different Christian people. Roman Catholics and members of the Assemblies of God, Syrian Orthodox, Christian Presbyterians, Mormons and Seventh-day Adventists would not agree on what is meant by "the values, ideals, spirit and commitment...of the man from Nazareth." Again -- even as I write these words, I am mindful of the fact that ours is a pluralistic nation in which Catholic Christians, and Protestant Christians, Muslims, and Jews, Buddhists and Hindus, honest agnostics and convinced non-believers are regarded as equal under the law.

I can pray that the United States will become Christian (as I understand and interpret my faith) with a measure of confidence and hope because of the nature of the republic and the composition of its peoples. We are encouraged freely to express and exercise our convictions while being denied the right to impose those convictions on others. The doctrine of the separation of church and state, as defined in the First Amendment of the Constitution, provides the essential safeguards. It insists that the church dare not be viewed as an arm of the state. It insists that the state dare not dominate or intimidate the church. The "wall of separation" is a porous wall. Each of these fundamental institutions of society, church and state, will influence the other. Neither, in the final analysis, will be permitted to control the other. This is doubtless what Martin B. Brown, an eminent American jurist, had in mind when he called the doctrine of separation, "the greatest achievement ever made in the course of human progress." Nothing must be done to destroy that achievement.

It is because I believe in the Constitution of the United States and in the persuasive and contagious power of the Gospel of Jesus Christ that I stand unalterably opposed to the so-called "school-prayer amendment." Let the church be the church, a basic social institution where the tenets and practices of the faith can and should be taught and practiced. Let the home be the home, where parents can teach their young by precept and example that which they believe. And let the state be the state, neither an arm of sectarian Christianity, nor a voice for unbelief, but an expression of government which guarantees the rights of each individual to be faithful to his or her own conscience.

I am a father and a grandfather. I want the youngsters in our family to be brought up in a religious tradition. My home and my church must assume this nurturing responsibility. I do not want a teacher who happens to be a religious -- or an irreligious -- zealot, a person who may be the antithesis of that which my particular faith represents, to use the public school as arena for manipulating and forming the philosophy of life of members of our family. That is not the function of the state. It is the blessed privilege and responsibility of the institution of religion and of the family to impart religious truth.

I will continue to pray and work for the evangelization of my country. I will, however, stand opposed to those who would write their sectarian metaphysics or religious practices into the laws of the land.

The United States is no longer a "Christian nation" -- if it ever

was. The National Council of Churches is opposed to the mistaken claim that it is, or ever could be, except in the sense suggested by Bishop Armstrong. In fact, in a 1959 policy statement in opposition to the "Christian Amendment," the Board stated:

Previous attempts to maintain "Christian states," in earlier centuries as well as our own, have been fraught with great problems and have failed in disillusion. They have frequently denied general liberty, and religious liberty in particular, to all who did not belong to the dominant body of Christians.... To declare the United States a "Christian nation" in the churchman's sense of "Christian" is to assert less of truth than of pretension.

(This policy statement is attached.)

Many people have responded favorably to the proposal to "get the government off our backs," and particularly to keep it out of any activities that might interfere in family life and the nurture of children by their parents. It is surprising that some of the same people are now proposing to allow State and local governments, through the state instrumentalities of public schools, to introduce religious forms and practices that will be at odds with those which some parents are trying to inculcate in their children. In this most sensitive area of family life, the clumsy and untutored intrusion of governmental authorities, however well-intended, is especially unwise.

It is sometimes claimed that some children would never hear the name of God if they did not have the benefit of public-school prayers, but that is precisely the kind of intrusion that some parents, if they are intentionally bringing up their children in a non-theistic approach to life -- as is their right -- may wish to avoid. Other parents may feel that their particular devout form of faith will not benefit from perfunctory recitations of someone else's prayers in a non-ecclesiastical setting, and so oppose it because public schools prayers are not religious enough.

The National Council of Churches cannot overlook the fact that Christians are admonished by the Lord Jesus Christ in the Sermon on the Mount not to make a show of prayer in public places:

And when you pray, you must not be like the hypocrites; for they love to stand and pray in the synagogues and at the street corners, that they may be seen by men. Truly, I say to you, they have their reward. But when you pray,

go into your room and shut the door and pray to your Father who is in secret; and your Father who sees in secret will reward you.

(Matthew 6: 5-6)

Christians should be wary of public school prayers for this reason, if for no other. It surprises us to see those who claim to be "Bible-believing Christians" disregarding this central admonition on how Christians should pray and pressing for a Constitutional amendment which would allow what the Lord of the Church does not.

It is especially unwise to inject prayer into a gathering of people brought together for other, and non-religious purposes, particularly when -- as in the case of public-school children -- they are brought together by coercion of law. They are not without other places to pray, together with others of common belief, if they should wish to do so. And the contention that some of them may wish to pray in a public institution does not make it incumbent on others to accede to that wish.

Those who wish to pray in public places -- contrary to the Lord's admonition -- are not entitled to commandeer public institutions as vehicles for their own free exercise of religion at the expense of others -- equally citizens and equally entitled to the use of the public arena -- who may not wish to pray at that place or occasion. To tell the latter that they may be excused is to permit the former to preempt the effective ownership of that public place by assertion of religious (as distinguished from civic) claims, a rather arrogant concept of what is necessary for their religious liberty!

III

Lastly, the proposed Constitutional amendment is unnecessary, since any person can pray to God at any time or place, and the Supreme Court cannot prevent it, nor can the Congress enable it. It is only oral, collective, unison prayer that requires "state action," and since that kind of prayer is not necessarily more efficacious than the silent, inward petition of the heart (as well as being less consonant with Christ's admonition), it is obviously being sought for symbolic reasons,

to make some kind of a statement or demonstration about the nature of the public school, the state, the nation.

Indeed, that is a recurrent argument of proponents of a prayer amendment: that public schools -- and our whole society -- have deteriorated since prayer was removed from public schools, and that restoring it will rectify the accumulated ills of the past two decades: vandalism, violence, drug addiction, delinquency, sexual promiscuity, and perversion, etc. Would that restoring prayers in public schools could have such a result! But children's lives are not transformed by magical incantations but by the models set for them in the conduct of their elders. And there is no need for a Constitutional amendment to enable adults to set a moral and righteous example for their children. They can do that now. To want to press prayer into service as a device for improving the moral climate of the schools -- desirable as that would be -- is to demean it from an end in itself -- communion with God -- to a means to another -- and lesser -- end: improving the behavior of (other people's) children. That is precisely what the Lord criticized about using prayer to make a public show for ulterior reasons.

The proposed amendment is unnecessary in another respect. If it is desired to make children more fully conscious of the religious roots and nature of this society, that can be done better by instructional, rather than devotional, means. After all, a school is better at teaching than at playing church. It would be appropriate for the public schools to teach children about the important part religion has played in human life, in history, in art, music and literature. The Supreme Court has not forbidden that; in fact, it said that no education is truly complete without it.

...it might well be said that one's education is not complete without a study of comparative religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment. ⁷

Yet few public schools are making any effort to fulfill that aspect of a "complete education," and few churches or church people are pressing

them to do so. If, after that immense opportunity has been utilized to the fullest, there is still a deficit in the public-school graduate's understanding of the importance of religion, then it may be time to consider amending the Constitution, but until then, it seems more than a little premature.

FOOTNOTES

1. Littell, Franklin H., From State Church to Pluralism, Garden City, N.Y., Doubleday, 1962.
2. Blau, Joseph L., Cornerstones of Religious Freedom in America, Boston: Beacon Press, 1949, p. 74-75, emphasis added.
3. West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).
4. Questions and Answers on the President's Voluntary School Prayer Amendment, The White House, Washington, D.C., May 6, 1982, p.3.
5. The Administration's Proposed Constitutional Amendment Relating to School Prayer, May 14, 1982, p. 32-33.
6. Commonwealth v. Cooke, 7 Am. L. Reg. 417 (1859), involving Bible-reading in Massachusetts.
7. Abington v. Schempp, 374 U.S. 203 (1963).

A PRONOUNCEMENT *A Policy Statement of the National Council of the Churches of Christ in the United States of America*

THE CHURCHES AND THE PUBLIC SCHOOLS

Adopted by the General Board

June 7, 1963

As Christians we acknowledge God as the ground and source and confirmer of truth, whose Spirit is ever ready to respond to men's and children's search for understanding by correcting their fumbling misapprehensions and leading them into larger and fuller truth. Teaching and learning at their highest are pursued within this recognition. As Americans we are firmly committed to the right of freedom of conscience and freedom of religion, that is, the freedom of each citizen in the determination of his religious allegiance, and the freedom of religious groups and institutions in the exercise and declaration of their beliefs.

The American tradition with respect to the relations of government and religion, often described as "separation of church and state" does not mean that the state is hostile toward, or indifferent to, religion. On the contrary, governments—national, state and local—have prevailingly acknowledged the importance as well as the autonomy of religion and have given expression to this principle in many ways.

In present-day American society, with its diversity of religious conviction and affiliations, the place of religion in public education must be worked out within this recognition of the prevailingly positive attitude of the American people as a whole toward religion and safeguarding of religious liberty.

As Christians we believe that every individual has a right to an education aimed at the full development of his capacities as a human being created by God, his character as well as his intellect. We are impelled by the love of neighbor to seek maximum educational opportunities for each individual in order that he may prepare himself for responsible participation in the common life.

CONCERN FOR THE PUBLIC SCHOOLS

We reaffirm our support of the system of public education* in the United States of America. It provides a

*In this document the terms "public education" and "public schools" are taken to mean the system of public elementary and secondary education in the United States.

context in which all individuals may share in an education which contributes to the full development of their capacities. It serves as a major cohesive force in our pluralistic society. We also recognize that significant value derives from the fact that this system is financed by public funds, is responsive to the community as a whole, and is open to all without distinctions as to race, creed, national origin, or economic status.

DEFINITION OF ROLES

Religious ideas, beliefs, values, and the contributions of churches are an integral part of our cultural heritage as a people. The public schools have an obligation to help individuals develop an intelligent understanding and appreciation of the role of religion in the life of the people of this nation. Teaching for religious commitment is the responsibility of the home and the community of faith (such as the church or synagogue) rather than the public schools.

We support the right of religious groups to establish and maintain schools at their own expense provided they meet prescribed educational standards.

We support also the right of parents to decide whether their children shall attend public or non-public schools. The parent who chooses to send his children to a non-public school is not excused from the responsibility of the citizen to support and seek to improve the public schools.

Neither the church nor the state should use the public school to compel acceptance of any creed or conformity to any specific religious practice.

It is an essential task of the churches to provide adequate religious instruction through every means at their disposal. These include both those activities which individual churches provide within their own walls and also various joint ventures of churches involving cooperation with the public schools. Christian nurture and the development and practice of Christian worship are inescapable obligations of the congregation and the family. We warn the churches against the all-too-human tendency to look to the state and its agencies for sup-

port in fulfilling the churches' mission. Such a tendency endangers both true religion and civil liberties. At the same time, we call the churches to renewed worship, study, work and sacrifice to fulfill their mission as God's people in the world.

PLACE OF RELIGION IN THE PUBLIC SCHOOLS

No person is truly educated for life in the modern world who is not aware of the vital part played by religion in the shaping of our history and culture, and of its contemporary expressions. Information about religion is an essential part of many school subjects such as social studies, literature and the arts. The contributions of religious leaders, movements, and ideas should be treated objectively and broadly in any presentation of these subjects. Public school administrators and textbook producers are to be commended for the progress made to date in including objective information about religion in various subject matter fields. Teachers should be trained to deal with the history, practices, and characteristics of the various religious groups with competence and respect for diverse religious convictions. Their greatest influence will be through the life and attitudes they reflect in the classroom. They should be free as persons to express their own convictions in answer to direct questions from pupils when appropriate to the subject matter under study.

The full treatment of some regular school subjects requires the use of the Bible as a source book. In such studies—including those related to character development—the use of the Bible has a valid educational purpose. But neither true religion nor good education is dependent upon the devotional use of the Bible in the public school program.

The Supreme Court of the United States in the *Regents' Prayer* case has ruled that "in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by the government." We recognize the wisdom as well as the authority of this ruling. But whether prayers may be offered at special occasions in the public schools may well be left to the judgment of the board responsible for the program of the public schools in the local community.

While both our tradition and the present temper of our nation reflect a preponderant belief in God as our Source and our Destiny, nevertheless attempts to establish a "common core" of religious beliefs to be taught in public schools have usually proven unrealistic and unwise. Major faith groups have not agreed on a formulation of religious beliefs common to all. Even if they had done so, such a body of religious doctrine would tend to become a substitute for the more demanding commitments of historic faiths.

Some religious holidays have become so much a part of American culture that the public school can scarcely

ignore them. Any recognition of such holidays in the public schools should contribute to better community understanding and should in no way divert the attention of pupils and the community from the celebration of these holidays in synagogues and churches.

We express the conviction that the First Amendment to our Constitution in its present wording has provided the framework within which responsible citizens and our courts have been able to afford maximum protection for the religious liberty of all our citizens.

CHURCH SUPPORT OF PUBLIC SCHOOLS

American public education should have the full and conscientious support of Christians and Christian churches. Therefore, we urge our constituency to continue efforts to strengthen and improve the American system of public education through positive steps such as the following:

1. Providing intelligent appraisal and responsible criticism of programs of public education;
2. Keeping informed about the needs of the public schools and studying issues related to public education as a basis for intelligent action as citizens;
3. Supporting able candidates for boards of education and being willing to serve as members of such boards;
4. Working at local, state, and national levels for improved legislative and financial support of public schools;
5. Emphasizing to prospective and present teachers the profession of public school teaching as a vocation that is worthy of the best service a Christian can give;
6. Exploring cooperative arrangements of the churches and schools whereby the church's teaching of religion may be improved.

In American education, there is a substantial inter-relation between primary, secondary and higher education.

It needs to be stressed that, in a substantial majority of publicly-maintained institutions of Higher Education, provision is offered for the voluntary election of courses in religion on a parity with all other subjects of the curriculum, and not infrequently for publicly-supported chaplains and other services of religion.

The question should be explored whether these arrangements through which religious instruction and services are provided within state institutions of Higher Education without infringement of law or offense to individual conscience may not offer suggestion for more adequate provision within the public schools of opportunities for the study of religion where desired, fully within the constitutional guarantees of freedom of conscience and of religious expression.

65 FOR, 1 AGAINST, 1 ABSTENTION

NOTE—The Greek Orthodox Church of North and South America has indicated that it disclaims and dissociates itself from this pronouncement.

A PRONOUNCEMENT *A Policy Statement of the National Council of the Churches of Christ in the United States of America*

OPPOSITION TO THE CHRISTIAN AMENDMENT PROPOSAL

Adopted by the General Board

June 4, 1959

The General Board of the National Council of the Churches of Christ in the U.S.A. reaffirms its support of religious freedom for all people and, being aware of proposals currently agitated for an amendment to the Constitution of the United States intending to declare that the United States is a Christian nation, sets forth the following concerns for the consideration of the churches and the nation.

(1) A constitutional amendment of this purport confuses the nature and function of the nation-state with the nature and function of churches. It would increase the present difficulties of citizens in comprehending and in continuing healthy separation and sound relations between church and state. These reflections are set forth with full awareness that this nation and all other nations stand constantly under the judgment and the sovereign authority of God.

(2) Previous attempts to maintain "Christian states," in earlier centuries as well as in our own, have been fraught with great problems and have failed in disillusion. They have frequently denied general liberty, and religious liberty in particular, to all who did not belong to the dominant body of Christians. In the American scene of today, a constitutional sanction for Christianity would tend to weaken the rights and liberties of citizens and others who are not Christians, to lessen respect for their distinctive concerns, and to accentuate divisions within the body politic.

(3) The intended amendment would strengthen the hands of those who desire financial and other privileges for Christian churches ready and able to secure

them—such as support of school and welfare institutions, extended tax privileges for property and enterprises under Christian names.

(4) The proposed amendment would embarrass our ecumenical relations and our missionary enterprises and also general international relations as viewed by Christians and by the world majority of non-Christians, through officially attaching the Christian name to military, economic, and other acts and policies of the Government of the United States.

(5) To declare the United States a Christian nation in the churchman's sense of "Christian," is to assert less of truth than of pretension. That term rightly belongs to significant religion, with biblical and theological meaning and simply is not applicable to the American nation as a whole. Moreover, the proposal in question, if given an aura of validity by incorporation in the Constitution, would tempt many unthinking church members to complacent hypocrisy in their outlook upon society, national and international. In fine, it is perilous, even sacrilegious, to turn to the political forum for practical determination of the public meaning of the great word, "Christian." The church cannot share this word, central and peculiar to its character, with the nation-state.

In the light of these considerations the National Council of Churches records its opposition to the proposal for an amendment to the Constitution of the United States intending to declare the United States to be a Christian nation.

59 FOR, 1 AGAINST, 0 ABSTENTIONS

National Council of the Churches of Christ in the USA
475 Riverside Drive
New York, NY 10115

James Armstrong, President

Claire Randall, General Secretary

Resolution on
Prayer in Public Schools

Adopted by the Governing Board
May 13, 1982

WHEREAS, in a Policy Statement entitled "The Churches and the Public Schools", adopted June 7, 1963, the Governing Board of the National Council of Churches said:

Neither the church nor the state should use the public school to compel acceptance of any creed or conformity to any specific religious practice..."

WHEREAS, the same Policy Statement also stated:

The Supreme Court of the United States in the Regents' Prayer Case has ruled that "in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by the government." We recognize the wisdom as well as the authority of this ruling...;

WHEREAS, the same Policy Statement continued:

We express the conviction that the First Amendment to our Constitution in its present wording has provided the framework within which responsible citizens and our courts have been able to afford maximum protection for the religious liberty of all our citizens...;

WHEREAS, the President of the United States has recently announced his intention to propose to Congress a constitutional amendment which could lead to the reinstatement of group prayer in public schools;

WHEREAS, the recitation of prescribed nondenominational prayer demeans true religion by denying the traditions of faith groups while imposing on some children religious practices which are offensive to them; and

WHEREAS, there is a danger that the rights of members of minority religions would not be adequately protected;

NOW THEREFORE BE IT RESOLVED THAT THE Governing Board of the National Council of the Churches of Christ in the U.S.A. reaffirms its belief, as set forth in the Policy Statement on "The Churches and the Public Schools" that "Christian nurture and the development and practice of Christian worship are unescapable obligations of the congregation and the family;" and

BE IT FURTHER RESOLVED THAT the Governing Board reaffirms its support of the Supreme Court language describing the First Amendment as providing no role for government in prescribing or providing for prayer in public schools.

POLICY BASE: Policy Statement on "The Church and the Public Schools: June 7, 1963.

PREPARED STATEMENT OF REV. JIMMY R. ALLEN

INTRODUCTION: Since some proponents of this proposed constitutional amendment on religious ritual in public schools paint those opposing its passage as disbelievers in prayer, liberals in theology, or secularists, I would like to begin my remarks by identifying my perspective on the issue.

I come as a theologically conservative evangelical Christian. Until rather recently I served for a number of years as pastor of a nine-thousand member congregation of Christians in the heart of one of America's major cities. I am convinced that the spiritual energy which caused that congregation to lead its state and be one of the leaders in the nation in what we Baptists call evangelism--that is leading persons to become believers through prayer commitment to God in life changing experience--came out of profound experiences of prayer. While there may be some voices arguing against the proposed amendment out of indifference to the prayer experience, I am not one of them. I argue against it out of that very concern for authentic and genuine expression of prayer. I think it is bad law which would produce either bland or bad results for genuine spiritual awakening in our land.

I come to speak for myself. It is a cardinal principle among Baptists that no Baptist speaks for another. This concept is often misunderstood and is difficult to convey, but it is very important to us. We call it the priesthood of the believer. Even during those years when I served our constitutional limit of time as the elected leader as President of the Southern Baptist Convention, I could only voice my own views to the minds and consciences of the nation's largest evangelical denomination. We also apply that principle to our convention

sessions and its resolutions. We elect messengers rather than delegates. Their role is to pass their own judgment on issues and convey that information to the congregations. It has no impact of authority. While considered as the best thinking of that group of Baptists in that meeting, each of the congregations is free to accept or reject that judgment as is each Baptist. As you know the messengers of our convention in annual meeting this June voted in favor of the passage of this legislation. The messengers in previous sessions had also spoken to this issue in its varied forms. In 1964, 1971, and 1980 the messengers voted to reject such proposals.

I come thankful for my heritage both as a Baptist and as a citizen of a nation which fought its way through the process of deciding that the best atmosphere in which religion could flourish and the state could function was through separation of church and state. It has been my responsibility in studying religious liberty issues to observe and communicate with people in countries in which religious relationships with the state are tangled and strife-filled....such as Belfast, North Ireland, Iran, and Israel. I have come away from those experiences convinced again of the wisdom of our arrangement in America. I am convinced that the best thing that can happen for religion in our nation among both young and old is to keep it free from government encroachment. In countries where religious passions are comingled with the powers of the state, chaos rules. In countries in which government has sought to promote, sponsor, finance, or meddle with religion, apathy is rampant. Officializing religion can only harm it.

I WOULD LIKE TO URGE YOU TO REJECT THE PROPOSED AMENDMENT ON RELIGIOUS RITUAL IN PUBLIC SCHOOLS FOR THE FOLLOWING REASONS:

1. Because the answer to the current confusion about free exercise of religion in public schools can be best worked out through the

processes of constitutional interpretations rather than through amendment of the basic document.

Don't amend it, interpret it.

There is confusion about what can and cannot be done in the free exercise of our faith within the context of public education. A great overreaction to the basic statements by the Supreme Court that governmentally composed prayers could not be forced on students has heightened this confusion. Both school patrons, boards, and administrations have been caught up in that process. Some lower courts also have demonstrated similar mixed interpretations of the free exercise clause.

We are now caught up in a strange mixture of religious fervor on the one hand and religious insecurity on the other. Patience is wearing thin with the slow processes by which our society hammers out the applications of its basic guarantees of freedom. You as political leaders are particularly subjected to the emotional intensity of that process. Simple slogans and a simple response are politically expedient for some of us. However, this amendment will confuse far more than it clarifies. It will create more barriers to genuine religious expression than it eliminates. It will divide us more than it unifies us.

For a number of years those caught up in the battle of vigilance for freedom of religious conscience have, along with our society as a whole, largely concentrated on hammering out the meaning of the no establishment of religion clause of the constitution. Religious groups bent on securing governmental powers of taxation for propagating their faith have created the necessity of such a process. The body of constitutional law interpreting the meaning of no establishment of religion clause has gradually evolved. It has

been slow and often frustrating, but it ultimately provides healthy answers for a society convinced both of its commitment to freedom in diversity and to protecting the rights of religious expression. Now our attention is being freshly turned to the meaning of the free exercise of religion aspect of the constitution. Religious groups bent on securing governmental powers of compulsory education for propagating of their faith have created the necessity for such a process. We must define the legitimate expressions and explanations of one's faith within one's working relationships as an educator or a student. That process will be complex and difficult. However, it can be done and must be done. The point is that it cannot be done with this constitutional amendment.

To attempt to solve the issue of free exercise of religion in public education as suggested in this amendment to the whole constitution is to use a sledge hammer and pick ax for an operation which demands a laser beam and scalpel. The amendment itself would create a whole new process for definition in constitutional law. With as many as two thousand religious expressions in our nation, there are scores of definitions of prayer. Every law school in America would have to have a constitutional law course just on defining what prayer is and is not.

2. Because the increase of sectarian strife which will be created by this amendment process is counterproductive to the noble purposes intended by its proponents.

Increasing sectarian conflict decreases the quality of both religion and education.

Every effort has been made by the proponents of this amendment to choose words which would avoid conflict. There is no clause or disclaiming sentence in the English language which will change the

basic facts involved in this proposal. Allowing for the prayer or religious ritual to be chosen by the majority of the community with due process of recognition of the exceptions present will not eliminate religious emotions creating sectarian strife. While some proponents of this amendment living themselves in basically homogeneous communities, shrug off the implication of Baptist children being subjected to Buddhist prayers or Mormon children being confronted by Roman Catholic ritual. I can assure you that the emotional conflicts in communities which will be aroused if this amendment passes, is debated in every state legislature, and is applied in diverse communities will be real and they will be damaging.

No clause or disclaiming sentence in the English language can remove the stigma and peer pressure on the child who chooses not to participate in the group ritual of religion other than his own. We are in the midst of an educational process. What do we teach in creating such a no win situation for a little child.

Few genuine spiritual results can be expected in a routine of ritual sponsored by adults who do not believe in what the ritual is saying, forced with school routines and assignments like academic disciplines. There are far better ways for families and religious groups to go about their task of nourishing spiritual experience than to seize the compulsory attendance laws and authority of school.

The public school is already an endangered species in our land. Many are now questioning the wisdom of our decision to effect social change through the public education system. While some of these changes are commendable and desirable, the scar tissue of those conflicts on the educational systems themselves are apparent. For Congress to thrust this process back into the fiery furnaces of religious conflict by putting this issue on the agenda of every state legislature and

every community may well make an early casualty of this new round of creedal strife the public school itself.

3. Because the right to pray is already safe in our nation.

Individual prayer needs no protection because it cannot be prevented.

The proposed amendment includes the words that nothing shall be construed to prohibit individual prayer in public schools of our nation. That wording implies that such prayers are subject to prevention or prohibition. No court decision, no school board action, no teacher's instruction can create or prevent individual prayer. Neither has any effort been made of the legal processes of our nation to do so. That precious experience is too valuable to trivialize. It is too personal and inward to be started or stopped by external authority. It is too essential to the well being of our nation for us to make it a political football.

CONCLUSION: You have been called on to examine this issue again and again. I believe the public discussion of free exercise of religion is healthy to our nation. The more I have examined it during these twenty years since the Supreme Court spoke on required ritual in public schools the more convinced I have become that if we can diffuse this issue of its periodic emotional intensity and move through already tested processes, we can arrive at the understanding of free exercise of religion which will be best for the state and best for religion. This constitutional amendment would be a mistake rather than a solution.

PREPARED STATEMENT OF CHARLES V. BERGSTROM

My name is Charles V. Bergstrom. I serve as Executive Director of the Office for Governmental Affairs, the Lutheran Council in the U.S.A. On behalf of the Council, I express appreciation to the Senate Judiciary Committee for the opportunity to testify in opposition to S.J. Res. 199, the proposed amendment to the U.S. Constitution dealing with prayer in public schools. I am speaking on behalf of three church bodies of the Lutheran Council:

The American Lutheran Church, headquartered in Minneapolis, Minnesota, composed of 4,900 congregations having approximately 2.4 million U.S. members;

The Lutheran Church in America, headquartered in New York, New York, composed of 5,800 congregations having approximately 2.9 million members in the U.S.; and

The Association of Evangelical Lutheran Churches, headquartered in St. Louis, Missouri, composed of 270 congregations having approximately 110,000 U.S. members.

These Lutheran church bodies maintain that the proposed constitutional amendment is unnecessary from a religious point of view and unwise from a public policy perspective.

The Lutheran church bodies I represent are aware of the serious theological and public policy difficulties which arise when government mandates religious exercises in public schools. Since the landmark decisions of the Supreme Court in 1962 and 1963 (Engel and Schempp cases, 370 U.S. 421 and 374 U.S. 203), these churches have consistently resisted legislative attempts to circumvent the court's actions or to enact a prayer amendment to the U.S. Constitution. This activity has been undertaken carefully and deliberately. Within these church bodies, consideration has been given to the school prayer issue by lay persons and members of the clergy, by individuals within our congregations and staff of regional and national church offices. The position I am presenting here has been determined in national church conventions at which congregational representatives gather, and subsequent implementation has taken place according to the churches' constitutions and bylaws. It represents the end result of an organized and democratic process which is acknowledged as legitimate by members of these church bodies.*

INAPPROPRIATE RELIGIOUS PRACTICE. Our position on school prayer reflects our theological and biblical conviction that prayers in public schools are not essential to the cultivation of religion in our youth. Prayer and religious readings in public school classrooms are often ritualistic in character with dubious value either as an educational or religious experience. In fact, prescribed prayer can be harmful, especially when offered under any measure of duress by an atheist or imposed on a person of different faith. The church bodies I represent maintain that the nurture of religious faith belongs in the home and in the church, not in the public schools. The families, not the school boards, have overriding responsibility for their children's religious education. We would make the following assertions:

1. We object theologically to "non-denominational prayers" which may uncritically mix nationalism and religion. As the Lutheran Church in America statement cited above says so clearly, "The more we attempt as Christians or Americans to insist on common denominator religious exercise or instruction in public schools, the greater the risk we run of diluting our faith and contributing to a vague religiosity which defines religion with patriotism and becomes a national folk religion."

*This testimony is based on statements of the Lutheran churches on prayer in public schools, two of which date back to 1964: "Prayer and Bible Reading in the Public Schools" (Lutheran Church in America) and "Prayer in Public Schools" (The American Lutheran Church). Since that time, the position articulated in these statements has been repeatedly reaffirmed by the Executive/Church Councils of these bodies and by their biennial conventions. These actions were affirmed in 1980 by the biennial national convention of the Lutheran Church in America, assembled in Seattle, Washington, and in 1981 by the Church Council of the American Lutheran Church.

2. We believe that the purpose of prayer is to praise and petition God, not to serve the secular purpose of creating a moral or ethical atmosphere for public school children. Prayer is communication with God which may change the person who prays--but it is not a tool to be used to "christianize" or "moralize" public education. Thus, the intent in sponsoring public school prayer is vitally important, and the Lutheran churches I represent resist any attempt by legislators or by school authorities to inject prayer into the public classroom in an effort to simply create a wholesome milieu for public school learning or to overcome immorality, as some independent preachers claim it should.
3. We perceive no need to "put God back into education" by sponsoring prayer in the classroom. He is there. As Lutherans in the U.S., we affirm the principle of "institutional separation and functional interaction" between church and government and recognize the distinctive calling and sphere of activity of each institution. We believe that God is active and powerful in all human affairs and operates through human institutions which maintain peace, establish justice, protect and advance human rights, and educate children--all proper concerns of the government. God's involvement in the good things of His creation, including education, is dependent on His love for us, not on government-sponsored prayer in public schools or other public buildings. One does not become more moral or evangelical by pushing for prayer in public school.
4. We are concerned about the quality of public school education and understand it to be inadequate when it is premised either on indifference or antagonism to the religious elements in history, in community life or in the lives of individuals. While the Supreme Court has ruled state-mandated prayer unconstitutional, it has not ruled out the study of religion in public schools. In this area, Lutherans see a positive challenge to interact with public school educators in order to develop programs which acknowledge the religious and moral dimensions of life while also respecting the larger religious neutrality mandated by the Constitution. Lutherans are responding to this challenge in many communities. I would be glad to share with you some of my own experiences in this area from the time I was a parish pastor.

The Lutheran church bodies I represent acknowledge that the historical situation in the United States has changed since the early days of the Republic when underlying religious beliefs were assumed. The influx of new immigrants, with varying traditions and creeds, and a range of other historical circumstances have contributed to a society which is thoroughly pluralistic. The Lutheran churches view this situation as a challenge and not a threat--a challenge to articulate clearly the tenets of our faith in this pluralistic culture rather than cling to practices which may have been appropriate at an earlier stage in our nation's development but which need reevaluation in the light of historical change.

QUESTIONABLE PUBLIC POLICY. The Lutheran churches I represent also recognize the public policy difficulties prayer in public school creates in terms of the religious rights of the individual and the welfare of the community as a whole. As Lutherans in the U.S., we cherish the guarantees of religious liberty which were written into the Constitution. We affirm the fact that the government safeguards the rights of all persons and groups in our society to the free exercise of their religious beliefs and makes no decisions regarding the validity or orthodoxy of any doctrine. These religious freedoms are guaranteed to all, to members of traditional religious groups, nonconformists and non-believers. We recognize that, given our pluralistic culture, religious exercises in public schools--even "non-denominational prayer"--infringe on the rights of some individuals and groups in society and invite sectarian divisiveness in the community. There is nothing holy or helpful in efforts to make this a "christian" nation by school prayer. It is indeed questionable that this can do anything but harm religious faith.

The changes mandated by the 1962/63 Supreme Court decisions should be understood in a positive rather than a negative light by those concerned about religious freedoms. A 1971 statement of the Church Council of the American Lutheran Church affirming these decisions expresses this sentiment and focuses on the freedoms protected by the Court rather than the restrictions posed:

We are free to pray in our own words to our own God. We are free to read the Bible in the version we prefer. We are protected against having to join in devotional exercises decreed by governmental authorities. We are free to pray in public and to read the Bible in public places. We cannot, however, force others to join us in such expressions of our religious

faith. These freedoms and these protections our Constitution, as interpreted by the Supreme Court in its school prayer and Bible reading decisions, presently assures us.

The following Lutheran Church in America statement, reaffirmed in July 1980 by representatives of the congregations gathered in convention in Seattle, Washington, discusses the public policy implications of prayer in public schools:

A due regard for all religious faiths and also for non-believers and nonconformists of all kinds makes it imperative that the public schools abstain from practices that run the risk of intrusion of sectarian elements and divisiveness. The public schools serve a unique and valued place in helping to build a civic unity despite the diversities of our pluralistic culture. It should be noted that when the state deeply involves itself in a religious practice in the public schools, it is thereby not only appropriating a function properly served by the church and the family, but subjecting the freedom of believers and unbelievers alike to the restraint that accompanies the use of governmental power and public facilities in the promotion of religious ends.

The Supreme Court has not prohibited voluntary prayer in schools--indeed, there is no way it could ban personal communication between an individual and God. What has not stood up to judicial scrutiny are prayer sessions mandated by law or organized by school officials. Contrary to the statement of President Reagan, children may be hurt by classroom prayers or the need to leave a classroom because of prayer.

The question of just what comprises voluntary prayer is central to this issue. The Lutheran churches, like the courts, question whether any school-organized prayer sessions can be completely "voluntary." Children attending public schools are there under compulsion of public law. Public school facilities are used, and the teachers--symbols of authority in the classroom--may supervise the exercise. These factors combine to operate with indirect coercive force on young and impressionable children, inducing them to take part in these exercises, despite freedom to be excused from participation. Persons with a genuine regard for prayer and the Bible object to having their children engage in these exercises when they are mandated by the compulsion of law. Our fundamental question is, "Whose prayers are to be offered?" This question has been too easily ignored in the promotion of this amendment by sincere but only glibly theological religious coalitions.

Such religious organizations differ among themselves as to what type of "voluntary prayer" would be acceptable from their religious perspective. Some would find interdenominational prayer acceptable, while others would insist on non-denominational prayer; yet others would find either practice unsuitable. To deal with these religious differences, several have suggested that "community standards" be the means for determining actual practice in the public schools. However, the "community standard" argument ignores the reality and the depth of these religious differences, especially as they regard minority groups, and does not seriously weigh the fundamental constitutional questions involved in this practice. Religious differences, even among advocates of school prayer, will surely find expression in diverse practices which could result in separate communities experiencing a greater or lesser degree of religious freedom.

The Lutheran churches' belief in God and the variety of channels through which He works is biblical and personal. We believe we are carrying out God's work through the church's evangelical ministry of salvation. Yet another facet of our response to God's Word is working with government to establish justice in the world for all groups and for all individuals--those who believe in God and those who do not. However, these two ministries of Lutheran churches are not to be uncritically confused; different means are appropriate to achieve the goals of our different ministries. Prayer is a personal communication with God, to be used because of our faith in God; it is not an appropriate public policy tool. Conversely, in our historical situation, the public schools are not an appropriate channel for evangelization. Our understanding of both of these ministries of the church leads us to strongly oppose the proposed constitutional amendment on prayer in public schools.

PREPARED STATEMENT OF NATHAN Z. DERSHOWITZ

On behalf of the National Jewish Community Relations Advisory Council and the Synagogue Council of America, we welcome this opportunity to testify concerning S.J.R. 199, a proposed constitutional amendment to permit prayer in the public schools and other public buildings. We urge you to reject this amendment.

The National Jewish Community Relations Advisory Council represents eleven major national Jewish community relations organizations -- American Jewish Committee, American Jewish Congress, American Organization for Rehabilitation and Training (ORT), B'nai B'rith, Anti-Defamation League, National Council of Jewish Women, Union of American Hebrew Congregations, Union of Orthodox Jewish Congregations in America, and United Synagogue of America -- as well as 111 local Jewish community relations councils.

The NJCRAC has long opposed prayer in the public schools. Recently it stated:

Religious observances in the public schools of our religiously pluralistic communities are unwarranted and imprudent

It is the genius of our system of public education that it proffers schooling to all our children equally, regardless of religion or race. Wisely, our national Constitution bars religious intrusions upon governmentally supported public institutions, including the public schools; but were that not so, we would still contend that schools publicly maintained for all the children should avoid imposing upon any of them religious observances offensive to their consciences, however great or small their relative numbers.

The Synagogue Council of America is the national coordinating agency for Conservative, Orthodox and Reform Rabbinic and Congregational organizations. Its constituent agencies are the Rabbinical Assembly, United Synagogue of America, Rabbinical Council of America, Union of Orthodox Jewish Congregations of America, Central Conference of American Rabbis and the Union of American Hebrew Congregations.

It recently noted its opposition to prayer in the public schools as follows:

It is significant that the Synagogue Council of America which represents the total American Jewish religious community (Conservative, Orthodox and Reform) opposes prayer in the public school. Clearly, we recognize the importance of prayer in the life of an individual and society. However, the First Amendment of our Constitution wisely leaves to the individual and religious associations responsibility to determine the nature of religious beliefs and practices. Over the years the Synagogue Council of America has consistently been opposed to the introduction of such prayer in the public school.

In the interest of religion, we therefore urge you, Mr. President, to oppose any legislation which would permit prayer in the public school.

Introduction

S.J.Res. 199 would amend the United States Constitution by adding the following language:

Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any State to participate in prayer.

The organizations joining in this statement urge rejection of this proposal.

We regard the principle of religious liberty and separation of church and state as fundamental to American society. We believe that any departure from that principle, embodied in the First Amendment, but which is far more than a mere legal rule, jeopardizes the political and religious freedom of which America is justly proud. We believe further that the American public school system, free and non-sectarian, is one of the most precious products of American democracy and a unique contribution to modern civilization, and feel ourselves impelled to express opposition whenever attempts are made to compromise its integrity. Finally, but most importantly for us, we as Jews know that, although the divisiveness which inevitably results when sectarianism enters the public school adversely affects all children, it is the

children of minority faiths -- our children, in other words -- who are injured most severely.

Our opposition to the proposed amendment is based fundamentally on a deep commitment to religious values and to the principle that such values must be espoused freely as an act of individual conscience. To people of all faiths, the purpose of prayer is spiritual communion with God. The home, church and synagogue are the proper, time-honored places which provide the appropriate setting for a communion with God. There, religious yearning and the needs of the soul can find satisfaction. Mechanical recitation of prayers in public schools, particularly prayers composed by government officials with a view toward popular acceptance, degrades these true religious experiences. It is harmful to the cultivation of the religious spirit.

Supporters of this Amendment often erroneously complain that the Supreme Court's decision has banned prayer from the public schools and thus denies students who wish to pray freedom of religion. For example, Martha Rountree in a letter on behalf of the "Leadership Foundation" states that "our Supreme Court said children could not pray in public schools. In fact, they went so far as to say that children could not even be given quiet time so that they could say silent prayer." The White House, which should know better, has issued a memorandum (hereafter White House Memo) which states (at p. 21) that the Amendment is necessary in order to permit, for example "voluntary prayer before meals." According to a recent Gallup Poll, the single largest reason why Americans support the amendment is because "people should have the opportunity to pray when they wish to." The perception that prayer is forbidden in the public schools is a distortion of applicable constitutional principles and what the Supreme Court -- and the lower courts -- have held.

All that is prohibited by the Constitution is officially sanctioned prayer. Purely private prayer, such as saying grace or the like has always been permitted. We believe that, unless disruptive of

school routine, such prayer is constitutionally protected. We are unaware of any instance in which school officials have attempted to prohibit such purely private prayer. In the unlikely event that school officials bar private prayer, we would be quick to join in any legal challenge to that practice. The simple fact is that this is a non-issue -- used to drum up support for an amendment that will destroy the First Amendment.

The Constitution, Majority Rule
and Minority Rights

Whether the Constitution should be amended to permit prayer in the public schools is, without more, an important issue, meriting the most careful consideration, particularly since it is a portion of the Bill of Rights which is in issue. Indeed over 500 constitutional lawyers *prof. & lawyer* have already signed a statement (attached as Appendix B) circulated by us urging that the Bill of Rights should not be tampered with.

Here we believe there is an even more important principle at stake -- that of constitutional protection for the rights of minorities. The Bill of Rights was added to the Constitution, in the now classic words of Justice Jackson:

... to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to * * * freedom of worship * * * and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

Many of the Founders believed that a bill of rights was unnecessary because the rights protected by those amendments were natural rights, not subject to defeasance by government. That view fortunately did not prevail, and restrictions on the powers of majorities were written into our fundamental law.

The Bill of Rights, then, are a self-imposed limit on the power

of majorities. Proponents of this amendment seem unwilling to acknowledge that there ought to be restrictions -- even self imposed ones -- on the rights of majorities to do as they please in the public schools. They seem to be saying "these are our schools. Since we are the majority, and this is a democracy we will do what we wish in those schools, although you may excuse yourself if you wish."

The difficulty we have as a minority group with this argument is that, no matter how nicely phrased, it means that there are to be officially recognized "insiders" and "outsiders" -- and no matter how much proponents speak of the Judeo-Christian tradition, we know that we are outsiders.* No matter how minimal the penalty for being an outsider, the fact remains that a person so branded ceases to be an equal member of society, participating as of right and not by sufferance. The willingness of the administration to suggest that only theists are worthy of constitutional protection (see p. 19, *infra*) bears out our fears.

Surely, there can be tyrannies of a minority. And surely in a democracy minorities must ordinarily bow to the will of the majority. But until now we as a society have accepted the notion that amongst those areas where the minority need not submit to the rule of the majority is the non-establishment of religion. No compelling need has, or can, be shown to justify a change in that wise and beneficent policy which has served this country so well.

Of course, a majority of Americans say they support "voluntary" prayer. We doubt that most of those Americans would support the present amendment if they understood all of its implications. And we recognize that members of this Committee will be under heavy pressure to support this proposal -- although we are certain that the pressures will not be one sided. But we believe that the public and members of this Committee will recognize that this amendment will imperil one of

* See, for example, the quote from Justice Story cited at p. 16.

this society's most glorious traditions -- government neutrality toward religion.

Teaching Morality

It is sometimes argued that prayer recitation and Bible reading somehow encourage a state of national and personal morality.* This argument was described as "false both in theory and practice" in testimony given to this Committee 18 years ago by Rabbi Joachim Prinz. He said in that at that time:

Religion is not a device to be used by the government for the advancement of its ends. It is against the interests of religion itself when it is manipulated by government in order to maintain and propagate specific, and often transitory, societal codes. The truths of religion grow out of profound faith and conviction, not of the needs of a particular society.

This argument for the amendment rests on the fact that the teachings of religion include ethical values and that religion has played an essential part in heightening and strengthening moral responsibility. This is true. Religion provides moral and ethical education. I question, however, whether "public school religion" can or ever has had that effect. Indeed, there is good evidence that state-sponsored religion does not increase the public morality of a country that endorses it.

When I was educated in German public schools, they provided as part of the regular curriculum separate religious instruction for children of the three major faiths. At that time, all children in public schools from the ages of 6 to 18 were required not merely to recite a prayer at the beginning of each school session but to receive religious instruction twice a week. That system continued in the following decades. In the 1920's and 1930's, I myself taught Jewish public school children as part of the state-sponsored program of religious instruction.

Did that program effectively teach morality to the German people? If it did it would be

* For example, the "Leadership Foundation," referred to above at p. 4, has urged its supporters to write Congress as follows in support of school prayer:

We need to get drugs, sex, immorality and disrespect for laws out of our schools and God back in our schools.

Then maybe our schools will be able to once again teach our children how to read, write and spell.

difficult to explain the rise of Hitler and the total moral collapse and even depravity of the German people, which resulted in the torture and death of millions of Jews and Christians.

I might add, though not from personal experience, that similar regular religious instruction in the public schools of Russia was given for decades prior to the Bolshevik revolution on 1917. In Russia, as in Germany, the concept of separation of church and state was not recognized as it has been in this country. That concept has long seemed to me to be part of a broader concept -- of total freedom of thought and conscience -- that has preserved the liberties of Americans throughout our history.

The Myth of "Voluntary" School Prayer

The arguments in support of this proposal, by President Reagan and others, depart in many ways from reality. Perhaps the most egregious error is the assumption that it is possible to make prayer a matter of free choice for school children when it is written, chosen, organized, conducted or sponsored by teachers, other school officials, or even the state legislature.* Sponsors of the proposal recognize, of course, that any proposal that expressly permitted school authorities to require pupils to participate in a particular form of worship would impair freedom of religion. However, they give this hard fact only token recognition. They say that the second sentence of the proposed amendment effectively bars any such coercion. In the words of the "Questions and Answers on the President's Proposed Voluntary School Prayer Amendment," issued by the White House on May 6, any pupil "can simply refuse to participate."

* The State of Alabama recently enacted a law which permits "willing" students to offer the following prayer:

We acknowledge you as the Creator and Supreme Judge of the world. May your justice, your truth and your peace abound this day in the hearts of our countrymen, in the counsels of our government, in the sanctity of our homes and in the classrooms of our schools. In the name of our Lord amen.

The reference to prayer "In the name of our Lord" makes this prayer, which would be permissible under the proposal before this Committee, unacceptable to Jews.

This delusion of voluntariness is belied by history and recognized as a fiction by countless educators and other persons who know how children think and act. To a child in a classroom, no part of the school routine is voluntary. It cannot be made so by the cruel device of telling them that they are allowed to brand themselves as pariahs by leaving the classroom or by staying there and remaining conspicuously silent during a religious ceremony that reflects the faith of a majority of their classmates.

Abraham Lincoln was once asked how many legs a cow would have if you called his tail a leg. His answer was, "Four. It doesn't make any difference what you call a tail; it is still a tail. Calling this proposal a "voluntary school prayer amendment" does not make it so.

Two recent cases in which I have been involved will help to illustrate that these fears are well founded.

Tennessee recently enacted a voluntary prayer bill. The state Attorney-General issued an opinion in which he advised school boards that the law only permitted voluntary prayer. Nevertheless, one teacher, doubtless well meaning, began the so-called voluntary prayer session by remarking "that the class would now pray except for 'Sam' who was Jewish and 'Muhammed' who was a 'Muslim'." Is that voluntary non-participation?

In Westchester County, New York, a school ran a Christmas program. When it came time to sing the hymn "Silent Night," the teacher stopped the proceedings, and escorted a Jewish child off the stage. This teacher was also well-intentioned -- she didn't want to compel the student to sing a song contrary to the student's religious beliefs. But was this non-participation educationally appropriate or voluntary?

Under the proposal before the Committee today, these and other cases like them would multiply. It is perfectly clear that there would be no legal recourse against such occurrences. Does this Committee want to countenance children being embarrassed and humiliated in this

fashion? And how can enactment of this amendment be viewed as advancing religious liberty?

Indeed, what actually happens when this unwise practice is followed is that at least some of the pupils depart from their parents' religious teachings because of the pressure from their teachers and peers to conform to the majority view.*

The fiction of "voluntary" action by school children has long been recognized by the Catholic community by bringing court suits to compel discontinuance of Bible reading in public schools even where Catholic children were given the option of reading from their own version and even though children could be excused from participation. Catholic opposition resulted in the adoption by the Cincinnati school board of a resolution bringing an end to the practice of Bible reading -- a resolution upheld by the Supreme Court of Ohio in 1872 in Board of Education of Cincinnati v. Minor, 23 Ohio St., 211.

Already in 1890, the Supreme Court of Wisconsin gave judicial recognition to the involuntary nature of school religious exercises. (State ex rel. Weiss v. District Board, 76 Wisc. 77):

When ... a small minority of the pupils in the public school is excluded, for any cause, from a stated school exercise, particularly when such a cause is apparent hostility to the Bible, which a majority of the other pupils have been taught to revere, from that moment the excluded pupil loses caste with his fellows, and is liable to be regarded with aversion and subjected to reproach and insult. But it is a sufficient refutation of the argument that the practice in question tends to destroy the equality of the pupils which the Constitution seeks to establish and protect, and puts a portion of them to serious disadvantage in many ways with respect to the others.

The truth of history and of educational realities was well summarized by Justice Frankfurter, concurring in McCullum v. Board of Education, 333 U.S. 203 (1947):

* Perhaps in recognition of the fact that public school prayers cannot be voluntary, a recent Gallup Youth Survey (March 1982) showed that public school students opposed, albeit by a narrow margin (45-42), prayer in the public schools. This suggests that those who are in a position to know best reject the illusion of voluntariness.

That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to the conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend.

Most recently, this view was reiterated by Judge Irving Kaufman in Brandon v. Board of Education, 635 F.2d 971, 978 (2nd Cir. 1981) cert. denied, 50 U.S.L.W. 3486 (1982):

Our nation's elementary and secondary schools play a unique role in transmitting basic and fundamental values to our youth. To an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed. This symbolic inference is too dangerous to permit

Proponents of school prayer argue (White House Memo at 34) that just as students opposed to saluting the flag for religious reasons are not entitled to stop other students from doing so, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. (1943), students opposed to school prayer should not be empowered to prevent other students from praying. The analogy is seriously flawed.

When a school engages in a secular ceremony, such as a flag salute, it neither intends to, nor does it, make any statement about religion. When a student from a minority faith has religious strictures against that practice, he is not required to dissent from a state-sanctioned religious practice. And any rule which prohibited schools from teaching a subject which some religious group objected to would bring the schools to a halt. Excusal, then, is the only practicable result.

By contrast, when the state explicitly sanctions a religious exercise -- and under the amendment, it may sanction even a sectarian religious exercise -- and a student is forced to dissent from that practice, the burden on the child in our judgment is substantially greater. A religious minority veto of secular practices is radically

different than creating a majority religious practice which is offensive to some religions. The difference may not always be crystal clear, but it is a difference nevertheless.

In sum, it is cruelly unrealistic to say that children may "simply refuse to participate." There is nothing simple about it.

Public School Religion -- A New Sect

The Questions and Answers issued by the White House include the following:

- Q) Will the state government or local school boards be free to compose their own prayers if this amendment is ratified?
- A) Yes. ... states and communities would be free to select prayers of their own choosing. They could choose prayers that have already been written, or they could compose their own prayers.*

The White House memorandum [27-28] is even more explicit in this regard.

If school authorities choose to lead a group prayer, the selection of the particular prayer -- subject of course to the right of those not wishing to participate not to do so -- would be left to the judgment of local communities, based on a consideration of such factors as the desires of parents, students and teachers and community interests consistent with applicable state law. The amendment does not limit the types of prayer that are constitutionally permissible and is not intended to afford a basis for intervention by federal courts to determine whether or not particular prayers are appropriate for individuals or groups to recite.

The proposed amendment also does not specifically limit prayer in public schools and other public institutions to "nondenominational prayer." A limitation to "nondenominational prayer" might

* This frank recognition that the prayers sanctioned by the proposal would indeed be written or selected by public officials was presumably dictated by necessity. Obviously, procedures in school rooms have to be conducted under the control of the school staff. They cannot be left to happenstance.

The Answer goes on to say: "... communities are a more appropriate forum than federal courts for decisions about the content of school prayers." This comment is unworthy of the White House. Certainly those who prepared this document know that no federal court has chosen content for school prayers. What they have held is that school authorities may not do so.

well be construed by the federal courts to rule out virtually any prayer except one practically devoid of religious content.

Under this amendment, then, school boards would be free to adopt the prayers of one denomination, and reject as unsuitable prayers of others.

Even if the history of the First Amendment is read -- wrongly, we believe -- to permit government to affirmatively foster religion generally,* it seems conceded by all that the Amendment was designed at a minimum to prohibit government from sanctioning one religion at the expense of all others.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

West Virginia Board of Education v. Barnette, 319 U.S. 638, 642 (1943).

Charles E. Rice, one of the leading -- and few -- academic critics of Engel, has argued, in The Prayer Amendment: A Justification, 24 S. C. L. Rev. 705, 710-11 (1972), that the Establishment Clause was not intended to prohibit favoritism towards theistic religions. In support of this proposition, Professor Rice cites Justice Story, Commentaries on the Constitution, §§ 1874, 1877 (5th Ed. 1891), who argues that the clause prohibits only preferences amongst Christians:

The real object of this amendment was not to countenance, much less to advance, Mohammedianism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government.

Even if this Christian**centered view of the intent of the

* Those anti-federalists who opposed the adoption of the Constitution advocated this view. Their views on this subject were rejected. See Storing, What the Anti-Federalists Were For (1981).

** Indeed, one could accurately say Protestant.

Establishment Clause is historically correct -- and it is not -- it surely does not follow that the Establishment Clause should be so limited in an America vastly more complex than that of two hundred years ago. In expounding a constitution, history has its place; it cannot be controlling:

[T]he Constitution is meaningful only as a living document. It must be interpreted in order to offer meaningful guidance in new and modern situations. If it needs no legal interpretation today, the Supreme Court should not be doing so, and we should select a group of historians to simply search the documents and explain the framers' intent, which we should then follow absolutely. The absurdity of supposing that the framers' intent should override our Court's interpretation can be fully realized when we consider the fact that the framers could not possibly have even imagined the problems of prayer in the public schools. There were no public schools as we know them when the framers lived; education was carried on almost completely in church-related schools where religious exercises were accepted without question.*

(Rep.) Schwengel, The Prayer Amendment: A Rebuttal, 24 S. C. L. Rev. 723 (1972).

It is true that the amendment does not permit religious favoritism in areas of public life other than prayer. But even in that context it would mean that public officials could permit only favored religious groups, offering approved prayers, to meet in the public schools or use public buildings or to allow government officials to censor prayers in public schools with which they -- or the community generally -- disagree.**

More fundamentally, the damage done to the principle that government should remain neutral as between sects would be irreparably

* And, we might add, there were far fewer religious groups in this country than there are today. Indeed, even if Professor Rice is right about the purpose of the Establishment Clause, this amendment must be rejected because it would permit, indeed encourage, clashes between various Christian sects.

** And it would mean that a church could conduct its regular services in public buildings for extended periods of time, serving as substitute for synagogues and churches.

damaged in the public mind, and hence as a viable principle for ordering our society.

This bedrock principle, one to which almost all citizens profess allegiance, is frequently subject to intense pressure when one or the other unpopular group appears on the scene. Today it is some of the cults. Not so long ago it was the Seventh Day Adventists and the Jehovah's Witnesses. Before that it was Jews, Catholics and Mormons. In each of these cases, the principle, sometimes battered and bruised, has survived because the principle is accepted in the public mind as inviolate.

But if this amendment passes, Congress and the state legislatures will have authoritatively concluded that this principle is not so inviolate after all. The courts, too, will take note of this determination and will no doubt be less willing than they are now to enforce this principle in the face of popular clamor. And the people, too, will no longer recognize this principle as being a necessary minimum for the survival of a religiously pluralistic society.

More broadly, it may be said that no controversy in human history has caused more persecution, oppression and bloodshed than the question of what is the true word of God and which is the correct way to worship him. The victims of the Inquisition were persons who worshipped the same God as the Inquisitors; they suffered only because they worshipped in a different way.

It has been a tragedy of history that these differences have divided adults into hostile and rival camps. It would be doubly tragic if these divisions were to be visited upon the public schools, which in our Republic should unite children rather than divide them.

The portion of the President's Questions and Answers that refers to the Lord's Prayer also contains an ambiguous statement which suggests that those Americans who do not adhere to a faith that includes a personal God are beyond the pale and deserving of no constitutional protection. This reduces to second-class status not

only atheists and humanists but also adherents of nontheistic religions, despite the fact that the latter constitute a substantial part of the population of one of our states -- Hawaii.

Some school officials may seek to avoid these pitfalls by seeking acceptable non-denominational prayers -- ones that have no roots in any deeply held faith. Thus, the secular members of the New York State Board of Regents, after consultation with clergymen of various religions, wrote its own prayer and recommended its use in the schools of the state. It read as follows:

Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.

It was the recitation of this prayer that the U. S. Supreme Court struck down in Engel v. Vitale, 370 U.S. 421 (1962), saying (at p. 425):

... in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by the government.

An extreme example of the trivialization brought about by the effort to avoid offending any one is the so-called "cookie prayer" which even omitted reference to any deity.

We thank you for the
flowers so sweet
We thank you for the food
we eat
We thank you for the
birds that sing
We thank you for
everything.

DeSpain v. DeKalb County School District, 384 F.2d 836 (7th Cir. 1968).

In sum, if we sanction the composing of religious exercises by secular authority, we invite the creation of a new religion, designed solely for the classroom, and shaped not by any system of religious beliefs but by a desire to avoid offense.

The expression of this "public school religion" is that of the lowest common denominator which can be found among the formulations of

all faiths. Jews reject references to Jesus, the Trinity and countless other concepts peculiar to Christianity. Christians will be unhappy if these formulations omit Jesus as the Messiah, and thus violate the very essence of Christianity. It is thus impossible to have a meaningful prayer acceptable to all religions -- even to all theistic religions. Inevitably, the "public school" prayer is a sterile rite, stripped of all the vital elements that give meaning to a genuine communion with our Creator.

Allowing public officials to select existing prayers which they believe are acceptable to all rather than to compose their own is no better. Existing prayers arise out of specific faiths and reflect their tenets. Supporters of the pending proposal deal with this fact by ignoring it. Thus, the President's Questions and Answers say:

The Lord's Prayer and the Ten Commandments are reflections of our Judaeo-Christian heritage that could not fairly be described as instruments for the imposition of narrow sectarian dogmas on school children.

This ignores the fact that the Ten Commandments are expressed, and even numbered, differently by various sects. And the Lord's Prayer, in addition to appearing in different versions within the Christian community, is entirely unacceptable to Jews for reasons stated in a resolution adopted by the Synagogue Council of America in 1963:

The prayer is taken from the New Testament, the basic source of Christianity. The designation "Lord" used in the title refers to Jesus, whom Christians regard as "Lord." Eminent Christian authorities, both Catholic and Protestant, insist on the distinctively and uniquely Christian character of this prayer.

Accordingly, this prayer is of a sectarian nature and should not be recited by Jews.

Prayer and Public Buildings

The proposed amendment also attempts to overrule those decisions of the lower state and federal courts which prohibit the use of school facilities for the conduct of student Bible and prayer clubs. See e.g. Lubbock Civil Liberties Union v. Lubbock Ind. School Dist., 669 F.2d

1038, rehearing and rehearing en banc denied, ____ F.2d ____ (5th Cir. 1982); Brandon v. Bd. of Educ., 639 F.2d 971 (2nd Cir. 1980). These cases have determined that, in the context of the elementary and secondary schools, such efforts, even if otherwise voluntary, inevitably carry the imprimatur of the state, and thus establish religion.

While we believe these cases are correctly decided, the Supreme Court has yet to speak to this issue. To amend the Constitution to overturn decisions of the lower federal and state courts, is inappropriate, particularly since the Supreme Court will undoubtedly soon have an opportunity to pass on the Lubbock case.

Finally, the amendment seeks to guarantee the right to pray in public buildings. The White House memorandum is unable to cite a single case in which a court has held that such prayers, in and of themselves, are unconstitutional. Indeed, the Courts have consistently held to the contrary. See Jaffee v. California Dept. of Motor Vehicles; O'Hair v. Andrus, 613 F.2d 931 (D.C. Cir. 1979); Marsa v. Wernik, 86 N.J. 232, 430 A.2d 888 (1981).*

CONCLUSION

The Supreme Court decisions barring official prayer in public schools do not prevent children from offering whatever prayers are prompted by their consciences or the teachings of their parents. And 20 years of experience shows that those decisions have not undermined America's religious faith. On the contrary, they have stood as a reminder and symbol of the freedom of conscience that is America's

* Even Chambers v. Marsh, ____ F.2d ____, petition for cert. pending, # 81-23, cited in the White House Memo at 19, n.50, as outlawing prayer in public buildings, held only that the legislature could not favor one religion by selecting, over an extended period of time, a chaplain of one denomination, and that the legislature could not pay the chaplain.* The latter holding would not be affected by this amendment, since it does not deal with government subsidies of religion. The former holding might well be overturned by this amendment, which as we have noted, would permit government officials to favor one religion over another. But it is precisely in this respect that the amendment is most radical -- and most dangerous.

proudest tradition -- a freedom that has itself protected and fostered religious faith.

Religion does not need, and should not have, the sponsorship or support of government. More broadly, we insist that religious practice should never be made a matter of majority decision. The faith of Americans has been kept strong through the home and the church and synagogue. It will continue to be strong if it is kept free from government intermeddling.

Joseph B. Robison
Marc D. Stern
Of Counsel

July 1982

Appendix A

We are distressed by reports that President Reagan intends to call for a constitutional amendment to sanction prayers in public schools. The compelling arguments that have prompted the undersigned organizations to oppose that practice in the past are still valid. We have repeatedly pointed out (1) that the broad concepts of freedom of religion and separation of church and state prohibit government agencies such as public schools from fostering religious practices or beliefs; (2) that experience teaches us that efforts to introduce religious practices into public schools generate the very interreligious tension and conflict that the First Amendment was designed to prevent; and (3) that it is impossible to devise a prayer that is acceptable to all groups and that any effort to do so trivializes prayer by robbing it of depth and meaning.

It is because of this trivialization that we are convinced that daily rote recitation of a school-sponsored prayer contributes nothing to the advancement of religion. On the other hand, in a diverse and pluralistic society, prayer which does contain depth and meaning for some will inevitably be offensive to many others.

It is no answer to these considerations to say that the prayers will be "voluntary." To a child in a classroom, no part of the school routine is voluntary. It cannot be made so by the cruel device of telling them that they are allowed to brand themselves as pariahs by leaving the room or by remaining conspicuously silent during the religious ceremony. Indeed, what actually happens when this unwise practice is followed is that at least some of the pupils depart from their parents' religious teachings because of the pressure from their teachers and peers to conform to the majority view.

The Supreme Court decisions barring official prayer in public schools do not prevent children from offering whatever prayers are prompted by their consciences or the teachings of their parents. And 20 years of

experience shows that those decisions have not undermined America's religious faith. On the contrary, they have stood as a reminder and symbol of the freedom of conscience that is America's proudest tradition -- a freedom that has itself protected and fostered religious faith.

Religion does not need, and should not have, the sponsorship or support of government. More broadly, we insist that religious practice should never be made a matter of majority decision. The faith of Americans has been kept strong through the home and the church and synagogue. It will continue to be strong if it is kept free from government intermeddling.

Appendix B

OUR MOST PRECIOUS HERITAGE

Our Bill of Rights is America's most precious heritage. For a century and three-quarters it has spread the mantle of protection over persons of all faiths and creeds, political, cultural and religious.

Under our system, special responsibility for the interpretation and application of the Bill of Rights rests with the Supreme Court. In discharging this responsibility the Court has from time to time handed down decisions which have aroused considerable controversy. Some of the decisions have been subjected to strong criticism and even condemnation. There have, no doubt, been decisions which have been deemed by a majority of the American people to have been unwise, either in the conclusion reached by the Court or in the manner by which that conclusion was reached.

It may be that the Court's decisions against state-sponsored prayer in the public schools belong in this category. We are, nevertheless, convinced that it would be far wiser for our nation to accept the decisions than to amend the Bill of Rights in order to nullify them.

We recognize that the Constitution provides for its own amendment, and that no provision of it, including the Bill of Rights, is immune to repeal or alteration at the will of the people expressed through the medium of constitutional amendment. Yet, it is relevant to recall in this respect the concluding paragraph of Thomas Jefferson's great Virginia statute for Establishing Religious Freedom:

And though we well know that this assembly, elected by the people for the ordinary purposes of legislation only, have no power to restrain the acts of succeeding assemblies, constituted with powers equal to our own, and that therefore to declare this act to be irrevocable would be of no effect in law, yet we are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present, or to narrow its operation, such act will be an infringement of natural right."

American liberties have been secure in large measure because they have been guaranteed by a Bill of Rights which the American people have until now deemed practically unamendable. If now, for the first time, an amendment to "narrow its operation" is adopted, a precedent will have been established which may prove too easy to follow when other controversial decisions interpreting the Bill of Rights are handed down. In the past, the Court has construed the provisions against infringement of the free exercise of religion and of speech and assembly, or securing the privilege against self-incrimination, or requiring fair trial procedures, in a manner deemed by many at the time to be unduly restrictive of the proper powers of government. It is certain that it will do so again in the future. If the first clause of the Bill of Rights, forbidding laws respecting an establishment of religion, should prove so easily susceptible to impairment by amendment, none of the succeeding clauses will be secure.

A grave responsibility rests upon the Congress in taking this "first experiment on our liberties." Whatever disagreements some may have with the Prayer decisions, we believe strongly that they do not justify this experiment. Accordingly, we urge that Congress approve no measures to amend the First Amendment in order to overrule these decisions.

Senator DENTON. Thank you very much. The hearing is adjourned.

[Whereupon, at 1:28 p.m., the committee recessed to reconvene subject to the call of the Chair.]

PROPOSED CONSTITUTIONAL AMENDMENT TO PERMIT VOLUNTARY PRAYER

WEDNESDAY, AUGUST 18, 1982

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 10:10 a.m., in room 2228, of the Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Present: Senators East, Specter, and Grassley.

Staff present: Eric Hultman, general counsel, full committee, and James McClellan, chief counsel to Subcommittee on Separation of Powers.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee will come to order. The committee continues this morning its consideration of Senate Joint Resolution 199, a proposed constitutional amendment to permit voluntary prayer in schools and other public institutions. We have a distinguished group of witnesses scheduled to appear today and their testimony on this important legislation will be of great help to the committee.

I regret that other Senate business will mean that I must leave the hearing early, but the able and distinguished chairman of the Subcommittee on the Separation of Powers, Senator East of North Carolina, has graciously agreed to chair the rest of the hearing this morning.

Now, I believe our first witness this morning is Congressman Stephen L. Neal of the Fifth District of the State of North Carolina.

Congressman Neal, we are pleased to have you with us, and you may proceed.

Do you have a written statement?

Mr. NEAL. I do, Mr. Chairman.

The CHAIRMAN. Would you like your entire statement to go in the record and summarize it, or do you wish to deliver it?

Mr. NEAL. It's a short statement, Mr. Chairman, and I would like to read it.

The CHAIRMAN. That would be fine, you may proceed.

STATEMENT OF HON. STEPHEN L. NEAL, A U.S. REPRESENTATIVE FROM THE STATE OF NORTH CAROLINA

Mr. NEAL. Mr. Chairman, I appreciate the opportunity to appear before the committee to discuss the issue of voluntary prayer in the

public schools—and, specifically, my resolution, House Concurrent Resolution 1, dealing with that subject.

I have followed the proceedings of the committee and the previous hearings in the House with intense interest because of both my personal concern about the school prayer controversy, and that of my constituency in North Carolina. It is an issue that is very much alive in the press and much alive in the minds and hearts of the people in North Carolina.

There are a number of proposals pending that attempt to return prayer to the public schools. The committee is considering a proposed constitutional amendment which supporters feel would remove the bar against individual and group prayer. Legislation has also been introduced that would strip the Federal courts of the authority to hear cases involving voluntary prayer. You have indeed heard eloquent and reasonable arguments from advocates and opponents of both approaches. Those who would formalize prayer in the classroom have pursued their objective with vigor; those who oppose it, with equal conviction. I say, Mr. Chairman, that there is a third approach wherein we may find an accommodation of the other two—that is, those who say we cannot, and those who say we must, pray in the public schools. The answer, contained in my resolution, which I will discuss at some length later, is that we can if we want to.

First, it is necessary, I believe, to clear up some of the misconceptions that exist concerning the Supreme Court's decision regarding prayer in the schools.

We know, of course, that the Court has not ruled out voluntary prayer in the schools. It has stated only that such prayer cannot be required, written, or supervised by the State or its representative; that is, the administrators or the faculties of the public schools. Yet while voluntary prayer is permissible, there has been great difficulty in formulating a recitative prayer, and a prayer period, that do not exceed the limits set by the court.

Second, this misunderstanding of the Court's rulings has created in the minds of many people the idea that the Supreme Court banned prayer in the schools, and in so doing has denied, rather than protected, their rights under the first amendment. The misconception has led to the widespread belief that "God has been expelled from the classroom."

The result has been both understandable and predictable. I have seen poll data which indicate that some 80 percent of Americans believe prayer in the schools should be permitted. That implies, of course, that 80 percent believe it is not permissible. The idea that one is not free to pray wherever and whenever one chooses is offensive to all Americans who cherish our fundamental freedoms, and especially to those who find in our religious tradition a source of great comfort and pride.

This concern has led, I firmly believe, to suggested solutions which are unnecessary and if carried to fruition could be intolerable. I have in mind the proposed constitutional amendment under consideration today. The committee has heard much testimony about this amendment, but I would beg your indulgence of some further thoughts on the subject.

The proposed constitutional amendment strikes at the very foundation of our constitutional form of government. It would compromise that most basic guaranty of our individual rights, the first amendment, which was appended by men of clear vision and noble purpose. That purpose, simply stated, was to guarantee that Government shall in no way control religious thought, speech, or practice. Further, it also guarantees that religion shall not control the state, and through Government impose the religious preferences of one persuasion upon a lesser number who do not completely agree with it. This we call the separation of church and state. It has served both constituencies extremely well.

Mr. Chairman, this constitutional doctrine was not established either easily or by chance. Powerful forces argued against it. I think we have to thank Thomas Jefferson and James Madison for insisting that it be part of our Constitution. Especially Mr. Jefferson, who fought this battle in the Virginia House of Burgesses, which ultimately established his bill of establishing religious freedom. It should be noted that only three accomplishments adorn the grave marker of Mr. Jefferson. That statute is one of them. He asked also to be remembered as author of the Declaration of Independence and founder of the University of Virginia.

Permit me to quote from Mr. Jefferson, and from his biographers, some of his observations about freedom and separation of church and State.

From Saul K. Padover's "Jefferson: A Great American's Life and Ideas":

In few things was Jefferson more consistent than in his advocacy of religious liberty, or more resolute than in his hatred of religious tyranny. He went further than those who merely believed in toleration. Mere toleration was a lazy man's creed; it meant indifference toward the political problems involved in the religious question. Toleration, therefore, was not enough. What Jefferson wanted, and ultimately achieved, was liberty—liberty fully protected by the law, to believe or not to believe whatever a man saw fit; liberty of the genuine Protestant variety, for a man and his conscience to care for his soul in his own fashion.

And from Mr. Jefferson's "Notes on Religion," penned shortly after he wrote the Declaration of Independence:

The care of every man's soul belongs to himself. * * * God Himself will not save men against their wills. * * * I cannot give up my guidance to the magistrates, because he knows no more of the way to Heaven than I do, and is less concerned to direct me right than I am to go right.

Mr. Jefferson in that instance was concerned about the State being in charge of religion. He was equally if not more concerned about the church being in charge of the State. Assailed by the stinging criticism of some of the clergy, he wrote to a friend:

They (the clergy) believe that any portion of power confided to me, will be exerted in opposition to their schemes. And they believe rightly; for I have sworn upon the altar of God, eternal hostility against every form of tyranny over the mind of man.

The last clause of that immortal statement is familiar to everyone who visits the Jefferson Memorial, for it is engraved in the marble there. The basic issue in his time, as in ours, was separation of church and State.

I would not contend, Mr. Chairman, that conditions have not changed since Mr. Jefferson's day. I would submit, however, that our need to be free has not changed; that it took many more years

after the first amendment was ratified to establish religious freedom uniformly throughout the States; and that we ought not to surrender 1 inch of the ground which our forebears struggled to gain for themselves and their posterity.

Former Senator Sam J. Ervin, Jr., a distinguished constitutional scholar, felt just as strongly as did the Founding Fathers that the separation of church and State must remain absolute, and in 1966 he argued forcefully and long against the Dirksen and Bayh proposals to amend the Constitution so as to reestablish prayer in the classroom. A telling point in Senator Ervin's argument was his observation that the Supreme Court's opinions, as he interpreted them, did not deal with the subject of voluntary prayer. "All they do is to hold that under the establishment of religion clause, the State cannot require religious exercises to be conducted in the public schools," he said.

Mr. Chairman, these distinguished Americans were absolutely right. If the State were to be given power to make us pray, it would have equal power to stop us from praying. The Constitution declares that the State does not have the power to make us do either.

But the problem remains. The people of America want prayer in the schools, and they believe their Government is prohibiting it.

I would argue that my resolution, House Concurrent Resolution 1, would solve the problem. This resolution confirms one, that the Supreme Court decisions did not prohibit periods of silence for the purpose of private prayer, meditation, contemplation, or introspection, and two, that local school authorities can now provide such periods of silence under the law. I respectfully urge the committee to consider this approach for the following reasons:

First. It would clear up the misconception that the Supreme Court decision of 1962 prohibits prayer in the public schools, and that Government—the Supreme Court—has expelled God from the classroom. The lack of a clear expression on the permissibility of voluntary prayer has had a "chilling" effect on local school boards which, upon passage of the resolution, would receive both guidance and encouragement to provide the opportunity for voluntary prayer in the schools.

Second. It would help restore the public's trust in Government, and in the democratic process, which many have come to doubt as concerns the issue of prayer in the public schools.

Third. It would inspire widespread discussions between students, their parents, and religious leaders of all religions and all denominations as to how the "periods of silence" suggested in House Concurrent Resolution 1 should be filled. In my opinion, such healthy discussion among all Americans contains, at the very least, the possibility of an understanding that reaches beyond the temporal and the transitory. Perhaps it would result in a heightened spirit of unity, while maintaining diversity; perhaps a higher awareness of man's relationship to his Creator and to his fellow man; perhaps a higher level of trust, tolerance, and understanding among ourselves.

Fourth. Finally, the passage of this resolution would restore truly voluntary prayer to the public schools, by which the majority might confirm, with no threat to or infringement of the rights of the minority, our Nation's motto: "In God We Trust."

[A copy of House Concurrent Resolution 1, submitted by Representative Neal, follows:]

H. CON. RES. 1

[97th Congress, 1st Session]

CONCURRENT RESOLUTION declaring the sense of Congress regarding periods of silence in the public schools

Resolved by the House of Representatives (the Senate concurring). That it is the sense of Congress—

(1) that the Constitution of the United States does not preclude periods of silence to be used, solely at the discretion of the individual student in public schools, for quiet and private prayer, meditation, contemplation, or introspection, even if these moments are supervised by a school official; and

(2) that public school authorities should recognize the historic importance of religion to our civilization by encouraging such periods of silence.

The CHAIRMAN. Congressman Neal, are you advocating in your amendment a period of silence?

Mr. NEAL. Yes, sir.

The CHAIRMAN. You would support this proposed amendment advocated by the administration, I presume, if it was before the—

Mr. NEAL. Well, Mr. Chairman, I know that 75 or 80 percent of the people of this country want prayer restored to the public schools. I think that the constitutional amendment is unnecessary. I think that if we were to pass my resolution that it would be clearly unnecessary.

The CHAIRMAN. In other words, you think it is preferable to pass yours?

Mr. NEAL. Yes, sir, I do.

The CHAIRMAN. But you do favor voluntary prayers in school.

Mr. NEAL. Yes, sir, I favor voluntary prayer.

The CHAIRMAN. So I presume you wouldn't object if this constitutional amendment were adopted.

Mr. NEAL. Well, I have to think long and hard. I think that it could be improved. I think that if in the constitutional amendment you have before you it was made clear that—

The CHAIRMAN. In other words, you haven't made up your mind on that.

Mr. NEAL. Well, I am trying to say that I think if it came to a vote I would probably have to vote for it, because I know that the American public wants prayer in the schools. I am just trying to say that I think there is a better way, that it is unnecessary, and that we can accomplish the goal that you, Mr. Chairman, and others that support this amendment want, without passing this amendment, and without running the dangers that I think are inherent in the amendment.

The CHAIRMAN. I believe all this amendment does is provide that no person shall be required by the United States to participate in prayer.

Mr. NEAL. Doesn't it attempt to establish prayer?

The CHAIRMAN. They should not be deprived of the opportunity of voluntary prayers.

Mr. NEAL. Well, when I say I think it can be improved, it might be improved, although I have not had a chance to—.

The CHAIRMAN. Well, the entire wording is this, it's very simple: "Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any State to participate in prayer." In other words, purely voluntary.

Mr. NEAL. Well, let me ask this, if I may, of the chairman: why is it necessary?

The CHAIRMAN. Why is what necessary?

Mr. NEAL. Why is this constitutional amendment necessary?

The CHAIRMAN. Well, because of decisions of the Supreme Court.

Mr. NEAL. Has the Supreme Court prohibited voluntary prayer?

The CHAIRMAN. Well, a lot of people feel that it has effectively been prohibited. They feel it is necessary to do this to clarify the situation.

Mr. NEAL. You see, that would have been my feeling also. I think it did not prohibit voluntary prayer, but I think people believe it did. That's why I think my resolution would clarify what the Supreme Court did and make the Constitutional amendment unnecessary.

The CHAIRMAN. Well, under your resolution, you feel, then, as this proposed constitutional amendment says, individuals or groups may pray in schools?

Mr. NEAL. Yes, sir.

The CHAIRMAN. I understood yours was just a period of silence.

Mr. NEAL. Yes, sir.

The CHAIRMAN. Yours is a period of silence as distinguished from the constitutional amendment that says that they can voluntarily pray as individuals or as groups.

Mr. NEAL. Well, under this approach, the school, the school as a representative of the State, would be empowered to set aside periods of silence. The students, of course, who did not pray voluntarily in the schools, would fill those periods of silence—some might pray, some might think, some might meditate. It is differentiated from the idea—

The CHAIRMAN. You wouldn't want to prohibit children from individually praying or in groups praying, would you?

Mr. NEAL. No, sir, my resolution would certainly allow that.

The CHAIRMAN. Well, by your period of silence, how can they pray aloud if they are going to be silent?

Mr. NEAL. Well, I didn't hear you say "aloud" before. I wouldn't mind myself hearing students pray aloud. I am just saying that I don't think the State should write the prayer, that the State should—

The CHAIRMAN. Oh, I agree with that, we agree there should be no mandatory prayer, just a purely voluntary prayer. If one child or a dozen children wanted to get out here and pray just what comes from the heart, then we feel they should be allowed to do it.

Mr. NEAL. Well, I don't disagree with that; in fact, I don't think they are prohibited from doing that now.

The CHAIRMAN. Well, that's the question, though, under the Supreme Court decisions. A lot of people feel that they are prohibited.

At any rate, we are glad to get your views, and I want to thank you for appearing here. I have got to go back over to the Senate now, and I am going to turn this hearing over to the able, scholar-

ly, and profound Senator from North Carolina, your home State, Senator East, who I think feels the same way I do on this subject.

Senator East, if you will take charge of the hearing, I would appreciate it.

[Senator East assumed the Chair.]

Senator EAST. Thank you, Mr. Chairman. Congressman, I wish to welcome you this morning. It's always an honor to have a distinguished colleague from the State of North Carolina here with us, and we appreciate your interest in the subject and contribution thereto.

Before I turn to a couple of questions, I wanted to ask you about your proposal here. I think one thing that needs to be clarified in this discussion—and your introductory comments brought it to mind—was what the purpose and intent of the first amendment was. The purpose and intent, I think the record is clear and categorical on this, was to prevent the central National Government from establishing a national church. It says "Congress shall make no law * * *," it doesn't say "Congress and the State and local government * * *"

So what the framers had in mind—and you were quoting some of the framers—was, to put it concisely, to leave to States and local government a monopoly on handling this issue. It has only been in the 20th century, beginning in 1925, generally with the Bill of Rights, and then 1940 in the *Cantwell* case, that the Supreme Court has moved beyond the intention of the framers and attempted to apply the first amendment to State and local government.

Again, I think in all this discussion it is imperative to keep in mind, since we all are fond in the American system of quoting the framers, what they had in mind when they put this clause in, that we shall not establish a national religion—Congress shall not do that. And I don't know of anybody in America today that is questioning that proposition.

It is interesting to note that both at the time of the founding when the Bill of Rights was added and on into the 19th century, it was a very common practice for States to have established churches—we had one in North Carolina at the time, the Anglican Church. Other churches were allowed to exist, but the Anglican Church was the established church. There were States like Rhode Island, which had no established church; and States like Massachusetts, which had one church, and where other churches were clearly discouraged. So you had great variety in the Thirteen Colonies and ultimately in the Thirteen Original States.

But my point is that there is a misconception among many people on this issue, believing as they do that some way or the other the framers intended the first amendment to apply to State and local government. They did not. That idea was spun out of whole cloth by the Supreme Court in our time.

Now, as to the *Engel v. Vitale* case, the 1962 case that, you are rightly noting, is the pivotal case that brings this subject before the House, you are correct, that the State of New York had a State composed prayer, a very innocuous prayer, incidentally that provided simply: "Almighty God, we acknowledge our dependence upon Thee and we beg Thy blessings upon us, our parents, our teachers, and our country." It was a very innocuous prayer in the

sense that it would not be offensive to any theist, Catholic, Protestant, or Jew; it could conceivably be offensive, of course, to atheists and agnostics.

It is true that the board of regents of the State of New York did write that prayer, that it was a State prayer that the Supreme Court was dealing with in *Engel v. Vitale*, and that they ruled it unconstitutional. And I would agree with you that in the holding of *Engel v. Vitale*—they didn't preclude the possibility of voluntary prayer.

The problem we have had since then, though, is what I would call the chilling effect, in which often State and local officials do in fact think that the Court prohibited voluntary prayer. And it seems to me, in your resolution, you would allow only silent meditation, which would by implication mean that spoken prayer is some way or other prohibited, which is interesting, I find, because you have already indicated you don't think voluntary prayer, spoken voluntary prayer, is ruled out by current Supreme Court interpretations of the first amendment. But yet your resolution, would it not, would seem to imply that the only thing permissible would be meditation—no spoken prayer. In short, Congress would be going beyond *Engel v. Vitale*. Obviously, you are not in favor of compulsory prayer, and few people are—but on the voluntary prayer end of it, you would confine it strictly to silence and meditation, is that correct?

Mr. NEAL. Well, Senator, the intent of the resolution would be that the extension of the State, the local school system, could establish periods of silence, but not establish a particular prayer. It does not speak to the question of students voluntarily praying in a classroom or on the playing field, or in some other location. What it attempts to do is to make clear that, as Senator Ervin said, the State cannot require religious exercises and cannot write the prayer. And I referred to the chilling effect that has concerned you and that has concerned me. I think that what has happened because of that decision is that school boards are leery of doing anything. What I think it is clear that schools could do, under the first amendment, and under that ruling, that Supreme Court ruling, is to provide for silence. The great difficulty comes if they go beyond that.

I don't think that it ought to be up to the school system as to how students fill these periods of silence. I think that should be left to the parents and the other religious teachers of the child. If the child wants to pray during that period of time, or meditate or contemplate or introspect or think or whatever—my point is that it seems to me perfectly within the spirit of the first amendment of the Constitution, and consistent with the Supreme Court ruling, that the school system set aside periods of silence. If the school itself goes beyond that, in trying to write a prayer or establish a prayer, I think that is where we encounter the danger.

Senator EAST. More precisely, though, your resolution says that the Constitution of the United States does not preclude periods of silence to be used solely at the discretion of the individual student in public schools, for quiet and private prayer, meditation, contemplation, or introspection, even if these moments are supervised by a school official.

All of that—maybe I make too much of your language here, and I will have to move on because time is running short, but it strikes me, just as an initial thought on your resolution, that it would preclude anything of a spoken nature. And that goes beyond *Engel v. Vitale*, which certainly did not, as you have already indicated, preclude spoken voluntary prayer. All your resolution provides for is unspoken voluntary meditation. So some way or other we lose the idea that you could have spoken voluntary prayer. I don't wish to belabor the point too much, but you say you are trying to clarify *Engel v. Vitale*. I suggest you go further than *Engel v. Vitale*.

Engel v. Vitale did not rule out voluntary spoken prayer; your resolution omits mention of spoken prayer and confines the constitutional protection to meditation, contemplation, introspection, and periods of silence.

Mr. NEAL. Prayer—prayer is mentioned very specifically in the resolution.

What I am trying to say—let me see what I can do to clarify my intent. It is certainly not the intent to go beyond. What I am trying to deal with is that chilling effect that you referred to, which has resulted in local school boards thinking that voluntary prayer is not allowable. That has been the problem, I think, and that is what I am trying, by this resolution, to help resolve. I am trying to address what the school system can do, what the local school board can be required to do. What it says is that they can provide these periods of silence; it doesn't say—as I am concerned that the constitutional amendment that is proposed and that you are considering might say—that the local school boards can somehow write a prayer that will then be the prayer used by the students, and then in effect forced on students; that some particular arm of the Government will be prescribing a particular prayer. I am not addressing what an individual student or group of students can do. Certainly I would find it offensive if individual students couldn't get together and pray, or if an individual student couldn't pray verbally—I guess there would be a problem with that, if it was disrupting the classroom or something. But what I am trying to address is the question of what the school can do, and my feeling is that the schools, though certainly prohibited from writing and enforcing prayers, certainly could set aside periods of silence.

Senator EAST. I don't think that is the issue, though, Congressman. I think the issue is this question of clarifying with constitutional authority that any voluntary prayer is not precluded in the classrooms of the United States.

Would you accept a change in the language of your resolution, simply using the language of the proposed amendment here? Your resolution would simply state that it is the sense of the Congress of the United States that nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. That would be a direct use of the language of the amendment in your resolution.

I find your language vague enough that it might preclude the idea of spoken voluntary prayer, and what we are trying to do through the amendment is clarify, not further confuse, an area that is already horribly muddled.

Mr. NEAL. It may be that the substance of your approach is better than this. May I ask you a question? Would you argue that the substance of your amendment, the language of your amendment, would be constitutional now, or do you think that an amendment to the Constitution is required? I think I would argue that probably as long as the State doesn't impose the prayer and doesn't write the prayer and doesn't lead the prayer, if it's truly voluntary, that what you suggest would be allowable now. And if that is the case, then I would say we don't need a constitutional amendment; we could pass a joint resolution or a concurrent resolution of the Congress and clear up this situation.

Senator EAST. I would like to point out this chilling effect, though, that just this past week the Federal district court issued an injunction against the Alabama prayer law, which permitted voluntary prayer. I am submitting that not only has *Engel v. Vitale* had a chilling effect on local authorities who don't understand constitutional law; now you have lower Federal district courts involved in this area as well. And it seems an appropriate time to begin to resist this tide of doing what I think is totally contrary to the first amendment, namely, establishing State-enforced secularism which would be tantamount to establishment of a national religion. Otherwise we will have come full circle, establishing State-enforced secularism, a religion, which, like other religions, is a way of looking at the nature of man, and of determining whence we have come and whither we go.

I think the discussion has been useful to this point—we have essentially been focusing on what would be the nature of the language. I guess my concern with your resolution is that it is vague and imprecise; it might have the right effect, but you could consider possibly using the language of the amendment. Then we would be agreed on what we are trying to accomplish. We move on to the next consideration which is: what is the proper vehicle for accomplishing our end of making it clear that voluntary prayer is going to be allowed in the classrooms of the United States.

If I might, because I know your time is precious, too—if I might turn to this question of the proper vehicle for accomplishing what perhaps we may be agreed upon is the common end. I would submit we have basically three routes to achieve this end: One, a sense-of-the-Congress resolution which you have proposed, which frankly I would look upon as being primarily cosmetic, because it couldn't speak with any constitutional authority. Certainly a sense-of-the-Senate-and-House resolution would have no force of law since it is simply an expression of our opinion. Such a resolution would really be meaningless, because if the Constitution says what the court has said it does, our opinion on the matter is purely gratuitous and would have no legal impact. Taking this approach, I would submit, might tend to further confuse the problem, indicating that we have done something authoritative and definitive when in fact we have done nothing of the sort, except to use a little cosmetic or two on it. A second route would be a statutory withdrawal from the Supreme Court of its jurisdiction to deal with voluntary school prayer. Now, clearly we have the power under Article 3 of the Constitution to remove jurisdiction—Senator Ervin has backed that up very strongly. Whether we choose to exercise it or not, of

course, is open to debate as it is a matter of prudence and judgment, but certainly if we withdrew the jurisdiction of the courts, like the Federal district court in Alabama, to interfere in matters of this sort, that law would have teeth in it. It wouldn't be cosmetic, it would have substance.

And then there exists a third route, passing, finally, a constitutional amendment, a route which the Senate Judiciary Committee is considering, and which is the issue before the House.

I think the latter two approaches have some merit and substance to them: withdraw court jurisdiction or, alternatively, pass a constitutional amendment clearly establishing, categorically, that the voluntary prayer is not precluded.

But as I see it, even if we could agree—I would be interested in your response to this point—even if we could agree upon the language that we wanted in your resolution, actually it has no force of law, does it?

Mr. NEAL. Well, I think it goes back—you probably answered and I didn't hear it clearly—to my question concerning your opinion as to whether or not what is provided for in the language of your constitutional amendment would be constitutional now. Now, I am certainly not a constitutional scholar. It does appear to me, though, that what you are suggesting and what I am suggesting in this resolution might very well both be constitutional now, and that to deal with this chilling effect that we both referred to, that a sense-of-the-Congress resolution, a concurrent resolution, even though you are quite correct, it doesn't have the force of law, would serve the purpose of clearing up this misunderstanding that I believe exists.

So I think much of it would depend on whether or not you, and in fact the courts, believe what you have proposed is constitutional now. I think it probably would be constitutional now, and so a constitutional amendment would not be necessary.

I don't think we ought to lightly amend the Constitution.

Senator EAST. Well, that is a separate proposition. One doesn't lightly amend the Constitution, but you asked me if our constitutional amendment would be constitutional—by definition constitutional amendments, if enacted, are constitutional.

Mr. NEAL. My question is, Would what you suggest in your amendment be constitutional now?

Senator EAST. Well, it would be constitutional if two-thirds of the Members of the Congress approve it and three-quarters of the States—

Mr. NEAL. No, my question is, Isn't what you suggest in that constitutional amendment in fact allowable now without passing that amendment?

Senator EAST. Well, we have already indicated that because of the chilling effect it is not clear to many what is constitutional. No. 1; two, we notice already lower Federal district courts are further continuing to crowd into this area, further continuing to blot out any possible reference in schools to religious practice, belief, or activity. I submit personally—I am not suggesting I speak for others—I think we are running the risk here in America today in terms of Supreme Court decisions and certain lower Federal court decisions of ironically and paradoxically going full circle with the

first amendment and establishing secularism as the national religion. We are creating a situation in the public schools of this country in which you cannot in any way, shape, or form have any positive reference to traditional Judeo-Christian values or theism, a school must be purely secular in terms of its perspective. Secularism, however, is a religion in the sense that it is a way of looking at the nature of man, a naturalistic, materialistic way, and once established it would amount to a national religion. And the Supreme Court has been imposing it despite the clear purpose of the first amendment, which was that we not have a national religion.

I think this amendment has prophylactic value in the sense that, if it isn't as bad as I am suggesting it is, what it would do is clear up and prevent the courts henceforth from intruding into this area. And it would certainly clear up the chilling effect problem, and it would certainly clear up any misunderstanding coming out of *Engel v. Vitale*. A constitutional amendment, clearly, for those who want to do something about the problem, I would submit, is the way it seems upon which everyone could agree, because some will say, "Well, we don't like to withdraw the jurisdiction of the courts, we think that is a bad practice, even though the power is there, and so on and so forth."

It seems to me that if one really wants to do something about the problem, it should be either by statute or constitutional amendment; everything else would have no legal authority, including joint resolutions of the Congress.

Mr. NEAL. Well, you are perfectly correct a concurrent resolution does not have the effect of law. I do think, though, that it would clarify the law as it exists now, and I think the law as it exists now would allow, the schools to establish periods of silence, and certainly does not prohibit voluntary prayer.

And I guess my own concern is that we might go too far, I guess—that is my basic concern—in the area of somehow getting the State into the business of establishing religion which I think is clearly prohibited by the Constitution. The province of establishing religion, it seems to me, ought to be the home and the church. Religious instruction primarily should be the responsibility of the home and the church, and school teachers or school administrators aren't trained theologians, and elected State officials aren't trained theologians, and I just don't think that they have any business writing prayers. I don't think you do either—I am not suggesting that; I am just suggesting that I am not at all sure that we need—in fact, I think my inclination would be to think that we do not need a constitutional amendment, nor would we need a limitation on the power of the courts to clear up what I think is a very bad misconception of what current law says. And that is the reason for my resolution.

I think it would do the job. I am not absolutely certain, but I would say that it might be worth a try.

Senator EAST. Well, I think on the resolution approach—again getting back to the question of constitutional authority—when you say it would be worth giving it a try, and I certainly appreciate your interest and desire to assist us in this subject, that it's clear that a resolution simply has no authority of law—that is just a fact of life; it would have no authority of law, so, hence, to me it's a

very pale cosmetic kind of response. It would give us a false sense of security when in fact nothing had been done, except, as maybe we in the Congress are inclined to do from time to time, to create the appearance for public consumption that something has been done. I know you act out of genuine belief, but basically we wouldn't have done anything except to pass a resolution that had no force of law, and was merely an expression of opinion as to what the Constitution provides.

Certainly there isn't a constitutional scholar in the land that for a moment would suggest that a concurrent resolution of Congress is binding in law.

Mr. NEAL. I think that the effect of my concurrent resolution would be to clarify current law, and I think that the American public, the local school boards, the courts, would pay some attention to it. I am not absolutely certain of it—and I guess my own opinion would be that it would be worth a try, that it would be a lesser step, it would certainly in terms of getting something done in this area be much quicker. If you were to agree, if your committee were to agree, I believe we could pass this resolution in this Congress, I believe it would sail through the House of Representatives. We could then observe the effect. A constitutional amendment, on the other hand, would take some time to wind its way through the States. And if one of the interests is getting this cleared up in a hurry, I think our resolution might be the best approach.

Senator EAST. But I think in the rush, we would have to concede we weren't doing anything that would have the force of law. Passing a resolution would merely create the illusion that we had done something when in fact we hadn't, and hence would delay genuinely effective action, action like withdrawing the jurisdiction of the Court or amending the Constitution. I would submit, moreover, for those wishing to clarify that voluntary prayer is not precluded, that we all ought, at least, be able to agree on the latter remedy. I mean, if we agree on the goal, passing an amendment is certainly an appropriate remedy. One can't quarrel that this is a legitimate approach to take.

But, in any case, I do certainly want to thank you very much for coming, and for your eloquent statement and your contribution to the dialog here. I know the Senate Judiciary Committee will want to give your thoughts very serious consideration.

Mr. NEAL. I thank my distinguished colleague for his patience in allowing me to—

Senator EAST. Well, it's a pleasure to have you; we always get great wisdom from North Carolina representatives.

Mr. NEAL. Well, not much wisdom from this quarter, but I thank the gentleman anyway.

Senator EAST. Thank you, sir, it's a pleasure to have you.

Because of a slight emergency that has come up, I am going to have to recess this hearing for about 15 minutes, and I shall be back as quickly as I can, all right? I am sorry, Mr. Attorney General. It's great to have you with us, but can you give us that length of time, I hope?

[The committee recessed at 11 a.m. and reconvened at 11:52 a.m.]

Senator EAST. If the hearing will please come to order, we shall stand convened again and proceed with the testimony and comments of the Deputy Attorney General of the United States, Mr. Schmuls. We are very honored to have him here with us this morning. I might note as a personal aside I had the pleasure of going through officer candidate school with him in the Marine Corps some few years ago, and always admired his work. I think it is a great credit to this administration that they have been able to recruit a man of his talent and ability. He already had a distinguished record of public service in and out of government, and was a practicing attorney before this administration recruited him. He is one of a group of very able and talented people down in the Justice Department, and I appreciate his taking the time to join us this morning. I wish to apologize to him and the rest that we had this delay. We had two votes while I was over there, and these interruptions are time consuming.

But, we are now back on the track, and I wish to welcome you, Mr. Schmuls. I appreciate your coming, and, since I know you have got many pressing matters to take care of, I certainly will not make you linger.

If you would like to make your statement—if you wish to do it extemporaneously you may—as concisely and briefly as you can, it would be helpful. I don't wish to cut you short, but anything that is written, as you know, can be made a part of the public record.

STATEMENT OF HON. EDWARD C. SCHMULS, DEPUTY ATTORNEY GENERAL OF THE UNITED STATES, ACCOMPANIED BY HON. BRUCE FEIN, ASSOCIATE DEPUTY ATTORNEY GENERAL OF THE UNITED STATES

Mr. SCHMULS. Thank you, Senator East, and I appreciate your kind words. I have with me here today on my right Bruce Fein, who is the Associate Deputy Attorney General, and has helped me with this constitutional amendment matter.

Mr. Chairman, I am not sure my statement lends itself to an easy summary. I have the time to read it. If you want to save time, I am happy to submit it for the record. On the other hand, I do have time to go through it, if you desire, and I really leave that up to you.

Senator EAST. Well, again, I suppose we will spend more time doing this than maybe if you just read the statement, but since all written material is made part of the record, I like to encourage witnesses, if they are so disposed, to summarize and state their remarks extemporaneously, to the extent that they can, or at least to quote sparingly. I can appreciate that since you represent the administration, you might feel a bit uneasy and awkward doing that because you want to make sure that the record is clear and precise. I yield to your judgment on that. We do have another witness here this morning plus a panel, and, unfortunately, because of the Senate business over here we have been thrown behind a bit, so I was simply trying to move through so that everyone would get an opportunity to be heard.

Mr. SCHMULS. Well, let me go through this, then, as quickly as I can.

Senator EAST. All right.

Mr. SCHMULTS. I am pleased to appear here today on behalf of the administration to support Senate Joint Resolution 199, a resolution proposed by the administration and introduced in the Senate by Chairman Thurmond and Senator Hatch. This resolution proposes an amendment to the Constitution to restore the right to engage in prayer in our public schools and institutions.

The President feels strongly that Congress should support this proposed amendment and should act on it as quickly as possible. We would ask that the committee work toward passage this session so that the States can begin the process of ratification before the end of the year.

In my statement I will explain why this amendment is a sound and necessary solution to the problems resulting from the prohibition of prayer in our public schools and institutions. Mr. Chairman, I would also like to submit for the record a copy of the administration's analysis of this amendment, and I ask that it be printed together with my statement.

Senator EAST. It will be.

Mr. SCHMULTS. The President has proposed this amendment in order to permit once again voluntary prayer in public schools and other public institutions. It is intended to reverse the effect of two decisions of the Supreme Court, *Engel v. Vitale* and *Abington School District v. Schempp*, which held that it is an impermissible "establishment of religion" in violation of the first amendment for a State to foster group prayer or Bible readings by students in public schools.

In *Engel v. Vitale*, the Court embraced an interpretation of the first amendment that prohibited recitation of the New York State Regents' prayer in the public schools. Although it was clear that students were not required to participate in the prayer, the Court determined that State sponsorship and endorsement of a particular prayer violated the amendment's proscription against an establishment of religion. In the *Schempp* case, the Court struck down Pennsylvania and Maryland laws requiring that public schools begin each day with readings, without comment, from the Bible. Although the State's practices furthered secular purposes and excused unwilling students from participation, the Court found them to violate the establishment clause. Emphasizing the strict separation between church and state adopted in its previous constructions of the first amendment, the Court concluded that the establishment clause precluded the Government from favoring religion as against nonbelievers.

The prohibition against favoring religion as against nonbelievers, some have argued, would appear to preclude any action by the States or the Federal Government affirming a belief in God. Thus, in the view of many Americans, the one provision of the Constitution expressly intended to protect the religious liberty of the people has instead been construed to prevent them from expressing their religious beliefs through prayer.

In the years following the *Engel* and *Schempp* cases, the courts have increasingly restricted the States from incorporating religious observances into the daily schedule of students in public schools. In one case, for example, a school principal's order forbidding kinder-

garten students from saying grace before meals on their own initiative was upheld. In another case, the Supreme Court affirmed a lower court decision striking down a school board policy of permitting students, upon request and with their parents' consent, to participate in a 1-minute prayer or meditation at the start of the school day.

The principles established in *Engel* and *Schempp* have been extended recently to bar the accommodation or even toleration of students' desire to pray on school property even outside regular class hours. For example, one court prevented a school from allowing students to conduct voluntary meetings for "educational, religious, moral, or ethical purposes" before or after school, even though other, nonreligious groups may do so. Other courts have forbidden voluntary prayer meetings, even the reading of prayers from the Congressional Record.

Even the venerable tradition of having chaplains open legislative sessions with a prayer, a tradition going back before the First Congress and widely followed in the States, is now under serious attack in the courts. One Federal court of appeals has already ruled that it is unconstitutional for a State legislature to have a chaplain to open its sessions with a prayer. A similar challenge to chaplains in Congress is now pending.

Against the background of these decisions, the President has proposed a constitutional amendment that will, in his words, "restore the simple freedom of our citizens to offer prayer in our public schools and institutions." The pressing need for this amendment is apparent from numerous considerations.

In reversing the two principal Supreme Court decisions foreclosing prayer in public schools, the administration's proposed amendment would restore prayer to a place in public life consistent with the Nation's heritage and, in our view, would accurately reflect the historical background of the establishment clause. The administration's analysis of the proposed amendment demonstrates that the establishment clause was not intended to prohibit governmental references to or affirmations of belief in God. In discussing the scope of the establishment and free exercise clauses, Erwin N. Griswold, former dean of Harvard Law School and former Solicitor General of the United States, stated: "These are great provisions, of great sweep and basic importance. But to say that they require that all traces of religion be kept out of any sort of public activity is sheer invention." And Justice Story concluded that "a[n] attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation" at the time the first amendment was drafted.

Second, this amendment reflects and reinforces this country's long history of recognizing the existence of a deity to whom humility and thanksgiving are due. For over 170 years, prayers or Bible readings were a familiar part of the schoolday for American children, and were viewed as an appropriate expression of humility and gratitude for the blessings which had been bestowed upon this Nation and its people.

Our country's most important public documents and occasions have traditionally been marked by a recognition of our dependence

on a Supreme Being. For example, references to God can be found in the Mayflower Compact of 1620, the Declaration of Independence, the Pledge of Allegiance, and the national anthem; on the Liberty Bell, the American seal, our legal tender, monuments such as the Tomb of the Unknown Soldier, the Washington Monument, and the Lincoln and Jefferson Memorials; and in the oath of office taken by Federal employees—including the President, all Federal judges and Members of Congress—and witnesses in judicial and legislative proceedings. American institutions have continued to reflect these religious beliefs as evidenced by the employment of chaplains in the legislatures and the Armed Forces, the proclamations and inaugural addresses made by almost every President, and the public recognition of Thanksgiving Day as a time set aside to express gratitude to a Supreme Being. Virtually all of the State constitutions refer to dependency on God. As the Supreme Court has stated: "We are a religious people whose institutions presuppose a Supreme Being."

Third, and closely related to the second point, this amendment is needed because the free expression of prayer is of such fundamental importance to our citizenry that it should not be proscribed from public places. The overwhelming majority of Americans have repeatedly made it clear that they favor a restoration of voluntary prayer to the public schools. Prayer in the public schools has long been considered a desirable and proper means of imparting constructive moral and social values to schoolchildren, while generally encouraging in them a practice of self-reflection and meditation. Conversely, the exclusion of prayer from the daily routine of students could convey the misguided message that religion is not of high importance in our society.

Fourth, by prohibiting students' voluntary prayers before meals, periods of meditation before class, and student prayer meetings in school buildings outside of class hours, the courts' concern with the establishment clause has overshadowed the first amendment right of students to free exercise of religion. As Justice Stewart has stated: "there is involved in these cases a substantial free exercise claim on the part of those who affirmatively desire to have their children's school day open with the reading of passages from the Bible." Although some may argue that those parents could pay to send their children to private or parochial schools, the Supreme Court has stated that: "[f]reedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way."

Fifth, the unintended but inevitable result of current judicial interpretations of the establishment clause is not State neutrality but a complete exclusion of religion which, in effect, is State discouragement of religion. The governmental neutrality mandated by the Supreme Court on matters of religion has proven in fact to be unachievable.

Finally, the amendment is needed because it would allow decisions of essentially local concern to be made by States and localities rather than the Federal judiciary. For over 170 years, school prayer issues were resolved at the State and local levels by the residents of the affected communities. Their choices regarding

school prayer reflected the desires and beliefs of the parents and children who were directly and substantially affected.

The proposed constitutional amendment is essentially intended to restore the status quo with respect to the law governing prayer in public schools that existed before the *Engel* and *Schempp* cases were decided, that is, when prayers such as the regents' prayer and readings from the Bible without comment were not thought to be unconstitutional. However, the proposed amendment affirms the fundamental right of every person to reject any religious belief, as he or she deems fit, and not participate in the expression of any religious belief.

By establishing that "nothing in this Constitution shall be construed to prohibit individual or group prayer," the proposed amendment would make clear that the establishment clause of the first amendment could no longer be construed to prohibit the Government's facilitation of individual or group prayer in public schools. The amendment also would foreclose reliance upon the implied coercion theory advanced by the courts, which presumes that any group prayer by consenting students has a coercive effect upon the objecting students in violation of their right to free exercise of religion, and that therefore no prayer is constitutionally permissible. However, as discussed below, the proposed amendment expressly protects the right of objecting students not to participate in prayer. This provision is sufficient to protect the rights of those who do not wish to participate without denying to all others who desire to pray an opportunity to do so.

The intent of the proposed amendment is to leave the decisions regarding prayer to the State or local school authorities and to the individuals themselves, who may choose whether they wish to participate. The proposed amendment would not require school authorities to allow or participate in prayer, but would permit them to do so if desired. Group prayers could be led by teachers or students. Alternatively, if the school authorities decided not to take part in a group prayer, they would be free to accommodate the students' interest in individual or group prayer by permitting, for example, prayer meetings outside of class hours or student-initiated prayer at appropriate, nondisruptive times, such as a brief prayer at the start of class or grace before meals. School authorities could, of course, develop reasonable regulations governing the periods of prayer, in order to maintain proper school discipline.

If the school authorities choose to participate in a group prayer, the selection of the particular prayer—subject, of course, to the right of those not wishing to participate not to do so—would be left to the judgment of local communities, based on a consideration of such factors as the desires of parents, students and teachers and other community interests consistent with applicable State law. Thus, the proposed amendment would restore the practice maintained throughout most of this Nation's history, in which the determination of the appropriate circumstances of prayer was made by State and local authorities. The amendment does not limit the types of prayer that are constitutionally permissible and is not intended to afford a basis for intervention by Federal courts to determine whether or not particular prayers are appropriate for individuals or groups to recite. Because the proposed amendment merely

would remove the bar of the establishment clause as construed by the Supreme Court, State laws regarding the availability of prayer in public schools would not be affected.

The amendment by its terms is not limited to public schools, and would apply to prayer in other public institutions as well. The intent of this language is to make the remedial provisions of this amendment coextensive with the reach of the first amendment's establishment clause as construed by the Supreme Court. Although most questions relating to public prayer arise in the context of public schools, the proposed amendment is drafted to apply to prayer in other public institutions, including prayers in legislatures.

The second sentence of the proposed amendment guarantees that no person shall be required to participate in prayer. This prohibition assures that the decision to participate in prayer in public schools and other public institutions will be made without compulsion. Those persons who do not wish to participate in prayer may sit quietly, occupy themselves with other matters, or leave the room. Reasonable accommodation of this right not to participate in prayer must be made by the school or other public authorities. Thus, the exercise of the right to refrain from participating cannot be penalized or burdened.

The guarantee against required participation in prayer parallels and reaffirms the protection already afforded by the free exercise clause of the first amendment. Thus, the second sentence of the proposed amendment assures that students and others will never have to make a forced choice between their religious beliefs and participation in a State-sponsored prayer. Indeed, the second sentence of the proposed amendment provides greater protection than the free exercise clause, because a person desiring not to participate in prayer need not show a religious basis for his belief. Accordingly, there would be no need for an inquiry into the religious basis for a person's decision not to participate in prayer.

The fact that one or more students do not wish to participate in prayer, however, would not mean that none of the students would be allowed to pray. The provision forbidding required participation in prayer is intended to be sufficient to protect the interests of those students. As the Supreme Court stated with respect to the Pledge of Allegiance, "the refusal of these persons to participate in the ceremony does not interfere with or deny the rights of others to do so." This would be the proper rule to apply with respect to school prayer: persons who do not wish to participate in prayer should be excused or may remain silent, but that should not interfere with or deny the rights of others who do wish to participate.

For these reasons, we strongly urge prompt action on this proposed amendment, so that the process of State ratification can begin. We began our national history with an unforgettable declaration that governments were instituted in order to secure to the people those inalienable rights, including life, liberty and the pursuit of happiness, with which people were "endowed by their Creator." Those rugged and inspired individuals who founded this Nation understood the importance of recognizing the source of our blessings. It is time that we restore the ability of our schoolchildren to do so as well.

Mr. Chairman, I shall be glad to answer any questions you or members of the committee might have.

Senator EAST. Thank you, Mr. Schmuls. I would like to welcome my very able colleague from Pennsylvania, Senator Specter. We have heard from Congressman Neal, and then we were interrupted by a floor vote, and so we are trying to pick up the loose ends and move on. I have indicated to the witnesses here that we have quite a long menu. I am trying, in fairness to them and the realities of time, to move the hearings as quickly as we can.

Mr. Schmuls, let me be brief. It would probably be no great secret that I do basically agree with the thrust of your remarks and analysis. I gather, not simply to ask a rhetorical question, I gather that the administration and the Justice Department feel that this constitutional amendment is the proper remedy and vehicle. What it would do would be to clarify that voluntary prayer, individual or group, in public schools is not prohibited by the Constitution, and, at the same time, to clarify, of course, that no person should be required to participate in any form of prayer. If prayer were required, it, obviously, then would no longer be voluntary. This is the proper vehicle because there is a problem created by *Engel v. Vitale* and its afterglow, and also, frankly, by some recent court interpretations.

The administration's position, then, again, is such that this is the proper vehicle—I gather you are answering that in the affirmative—and, second, that there is a legitimate and serious and substantive problem that warrants attention, since one does not lightly amend the Constitution of the United States.

Are you in the administration answering those two questions in the affirmative? I gather you are.

Mr. SCHMULS. Yes, that's right. We think the advantage of a constitutional amendment is, one, it provides certainty, we believe clarity, and would restore the status of the law to what it was prior to 1962, and, indeed, to what it had been for 170 years, and that is to permit voluntary prayer in our public schools. The administration believes, this is consistent with American traditions and our religious heritage.

Senator EAST. All right, I thank you. Senator Specter.

Senator SPECTER. Yes, thank you very much, Mr. Chairman. It's nice to see you here, Mr. Schmuls, I know how busy you are with the many responsibilities in the administration of the Department of Justice. I have just a few questions.

When you say that you seek certainty, I can certainly understand that. I note that in the *Abington* decision, Justice Brennan, in a concurring opinion, said that in his opinion there was no constitutional objection to the public schools observing "a moment of reverent silence," my question is, If it were certain that the Supreme Court would uphold the setting-aside of a period of time for a moment of reverent silence, which would presumably mean that children could pray or not, as they chose, would that satisfy the policy objectives which you seek through this constitutional amendment?

Mr. SCHMULS. I don't believe it would. I think the Supreme Court might or might not decide that tomorrow. Obviously, Supreme Court decisions can be changed. It seems to the administra-

tion that it is desirable to return our society to the legal posture we had prior to 1962, and to state very clearly in the Constitution that voluntary prayer in public schools is something that we should not discourage. I am not at all clear that Justice Brennan's observation in his concurring opinion would be found today by the Supreme Court not to violate the Constitution. Senator East had a discussion with a prior witness on the meaning of voluntary prayer, and the Congressman took the position that voluntary prayer was not barred by the Constitution. I must say I think that's a very complex question; it isn't at all clear to me that if the school sets aside some time, during the school day, a period for silent meditation with a teacher supervising that period, whether or not that is constitutional; indeed, I think there is good reason to believe that that is not constitutional, as interpreted by the Supreme Court.

It seems to me that we ought to eliminate those questions. I agree that no constitutional amendment can eliminate all questions, but whether a prayer, whether silent meditation is permitted, or whether a teacher can lead the students in saying the Lord's Prayer—it seems to me that if we are going to deal with that issue, we ought to clear up as many of those questions as we can in a fair way for a longer period of time than might exist by virtue of one Supreme Court decision.

Senator SPECTER. Well, the objective of neutrality has been articulated by many as the desired goal. Let me take this opportunity to say that I have not made up my mind on this subject. I have been here, along with Senator East, for just a year and a half, and this issue has not come before the U.S. Senate in our short tenure here, and it is a very involved proposition, and I have an open mind on it.

But in reading some materials, many are looking for neutrality, so that those who wish to pray, can pray, so those who don't wish to pray are not under any compulsion to pray. And that appears to be the thrust of the amendment which you are proposing here today.

Mr. SCHMULTS. That's correct.

Senator SPECTER. Beyond Justice Brennan's concurring opinion in *Abington*, the New Hampshire Supreme Court has on two occasions advised the State legislature that statutes prescribing a period for silent meditation at the beginning of each school day would be constitutional, and there is one case, *Gaines v. Anderson*, a three-judge Federal court in Massachusetts upheld the constitutionality of the State statute prescribing a period of silence "for meditation or prayer" at the beginning of each school day, so that there is a fair amount of authority to suggest that in that neutral setting, that today such voluntary prayer would be constitutional.

Mr. SCHMULTS. Senator Specter, if I could add one point—in the analysis that I submitted for the record today on page 17, there is a reference to a Supreme Court decision that affirmed a lower-court decision striking down school board policy of permitting students, upon request and with their parents' consent, to participate in a 1-minute prayer or meditation period at the start of each school day. I think that is very close to those cases that you have been citing.

It seems to me that we would be unwise to rely on changing compositions of courts in something as fundamental as this, and there is a chance now—and we believe, the overwhelming majority of the American people support the return of prayer to public schools, that the way to do it, and a way that we can best reflect the desires of the American people, because, of course, this constitutional amendment goes not only through the Congress but the State legislatures, is to adopt the amendment route. This is a sure route that will enable us to say with certainty that we can return prayer to the public schools, but do so in a way that does not compel any child to participate, does not lead any child to feel excluded. We are confident that local school districts, that parent-teacher associations and others, will be able to devise ways to do this, that these decisions are best made at the local level, where they can be made in the rich diversity of our country. There is no need to have the uniformity that has been imposed by the Federal courts in this area.

Senator SPECTER. Mr. Schmults, it's a sure route, if it occurs. But a test case in the U.S. Supreme Court could be structured in a much more abbreviated time than it will take for a constitutional amendment to go the route.

Senator East and I were interrupted from these proceedings to go to the floor to vote on a motion at the table, a proposition that said that the courts and the Justice Department would continue to have jurisdiction over the issue of school prayer—we were just there; and it's a very hotly contested issue, and its fate is very, very uncertain as to whether two-thirds of the U.S. Senate and then two-thirds of the House will move.

I also have another concern about constitutional amendments.

Mr. SCHMULTS. May I add just one point there, Senator?

Senator SPECTER. Surely.

Mr. SCHMULTS. It seems to me that where we are talking about time, although the President would hope that the Congress would move swiftly to approve this amendment, so that it can be considered by the States, I think that one has to remember that we seek to go back to what the practice has been for 170 years. And so, that was a long period of time.

We have been living in a sense with the *Engel* case now for 20 years. And so, it seems to me that we ought to do this in a careful, certain way. I don't believe considerations of time, whether a test case could be constructed in 6 months or whether it would take 2 or 3 years to ratify this amendment—and I think it would take less if we could get it to the States—outweigh the advantages, again, of certainty and of fixing the problem of what we believe is a misconstruction of the first amendment, by following the amendment route.

Senator SPECTER. I was about to say, I have a concern about the amendment route in terms of constitutional government. I certainly do believe that amendments are necessary from time to time, and have supported constitutional amendments, and did vote in favor of the constitutional amendment for a balanced budget.

I do have a reservation, however, as to the constitutional amendment route in areas where a court has spoken. And, as district attorney of Philadelphia, I was very much concerned about the Su-

preme Court's decision in the *Miranda* case limiting confessions and in the search-and-seizure area and in lineups and in a great many areas which very much tied law enforcement's hands, but opposed constitutional amendments, even though that was a field of great concern to me, because of my underlying view that the court as an institution had a great stabilizing effect, and that it was unwise to overrule specific Supreme Court decisions by constitutional amendments because of the historic role of the Court as a unifying factor, and that given the problems that elected officials, even in wealthy places like the Congress of the United States or the executive branch, that there is equality from the Court, through the life tenure and the institution of the Court, in molding our national standards.

And, as I say, while I have an open mind on this amendment, it seems to me that it might be at least desirable for the administration to approach a two-track course where you can pursue the constitutional amendment but, at the same time, seek a decision by the Supreme Court of the United States on this issue of neutrality, of the meditation time, where the Court might satisfy the policy objectives which you are looking for on the constitutional amendment.

Mr. SCHMULTS. Well, Senator, of course there have been constitutional amendments which have reversed Supreme Court cases, such as the *Dred Scott* decision, the case declaring the income tax laws unconstitutional, would be another example where we had a constitutional amendment to change a court decision.

It seems to me, in this area, it would not just be one decision; we would have to go through a whole series of decisions, again, to develop what the appropriate reach of the first decision would be. I think it's important to note that our amendment would go beyond what you have suggested in that our amendment would in fact reverse the effect of the *Engel* case and the *Schempp* case and would permit teachers to lead school prayer. Teachers or student leaders might also read brief passages from the Bible. And what the administration is trying to do is really to restore the status that we had, we believe, without serious problems for 170 years in this country. It wasn't until 1962 in the *Engel* decision that school prayer was in effect barred from our public schools, and we think that decision should be corrected by a constitutional amendment. It's a way that best allows the people of this country to express their views. And if our belief is correct, the overwhelming vote of the American people would be to return prayer to our public schools; the polls show over 70, over 80 percent, so we think, if Congress will let this issue get to the American people, that they will speak through their State legislatures and ratify this amendment.

It is really a very narrow thing we are doing here. This is clearly not an assault on the first amendment or the Constitution or the rights of religious minorities or anything else. It merely restores prayer to our public schools in a very careful way, in a way that protects the interests of religious minorities, and is consistent, we think, entirely consistent with our heritage and with American traditions.

So this is not something that we believe that people, who look very carefully at what the President has proposed, ought to be concerned about.

Senator SPECTER. Mr. Schmults, how would you effectuate the second sentence? "No person shall be required by the United States or by any State to participate in prayer."

Your suggestion is that, if a student wishes not to participate, that the student would rise and leave the room?

Mr. SCHMULTS. Senator Specter, really the concept behind this amendment is that those decisions should be returned to people at the local level—the parents, if you have a parent-teachers association, the local school board, or others in the local community. We are confident that, one, they will be able to, if they choose to do so—there is nothing that requires them to do this—choose to devise a prayer that will be satisfactory to the local community. We believe that they will devise ways in which those who do not agree with the expression reflected in the prayer, or who are members of a religious minority in that particular community, will feel comfortable in not participating. There are a variety of ways that could be done. For example, the prayer period could be held for 2 minutes before the schoolday started. Those students who didn't want to participate would come, then, at the start of the official schoolday or class. There are a variety of ways by which this could be accomplished. But it would be left to the local community in the first instance to do that.

The courts, of course, would remain open to protect the rights of people of different religious persuasions, minorities, and to insure that there was no compulsion or requirement to participate; that is to say they are not discriminated against.

Senator SPECTER. Would you think it an acceptable alternative for the local governing body to say that, when the time is set aside for prayer, that any student who does not wish to participate may rise and leave the room?

Mr. SCHMULTS. Or stand and remain silent, or stay in their seats. I would think that that would be up to the local community. It would seem to me that if other circumstances were such that one couldn't find any compulsion or any discrimination, that, yes, that would be a satisfactory way to handle that problem. I believe that was the way it was handled in many, many school districts prior to 1962.

Senator SPECTER. Thank you very much, Mr. Schmults. Thank you, Mr. Chairman.

Mr. SCHMULTS. Thank you, sir.

Senator EAST. Thank you, Senator. I will make one final observation, and then we will go to Dr. Robertson, because I know we are all pressed for time here.

I think your point is well taken, Mr. Schmults. Putting it in a little broader context—and appreciating the legitimate problems that Senator Specter raises—beyond this first amendment problem, I think many people today have a fundamental problem understanding the idea of federalism; many people are unable to trust State and local government to do anything, including addressing the issue of religious observance or practice in a given institution. Why couldn't we, as the framers did, simply trust State and local

government and trust in the commonsense of the people at the State and local level?

There is a certain elitism evident in some contemporary philosophy in this country, manifested in the idea that we dare not trust State and local government, that those here at the center in Washington invariably know best. Whether it's the Congress or whether it's the House, whether it's the White House, or, above all, the Supreme Court that speaks, many now view their opinions as ex cathedra pronouncements that should be carried out by edict and fiat.

I think, as you indicate when you talk about this amendment, people will look at the very difficult and practical problems that the amendment might raise, and try to visualize the very precise form in which it will be implemented.

Well, I would simply say, let's throw ourselves, if we might, back on the idea that State and local government in this federal system, which are the fundamental units and the creating units of our Nation, might be trusted from time to time to make some important decisions that affect them and their institutions. I would be willing to trust the State government of North Carolina and the local school boards of North Carolina. I would be willing to trust the school board of Philadelphia.

And I think the Attorney General is correct here that what the amendment would tend to do, in a broader thrust, is to push some of this decisionmaking back to State and local government. Not to press the point too far, it might even be consistent with the so-called New Federalism.

But I would refer back to the idea that the framers across the board would have had no trouble, not the slightest difficulty, with the idea that State and local government could be trusted with these matters, and that is exactly what the first amendment did. It said Congress shall not regulate this area; that State and local government shall have it as their total prerogative.

But ironically, I repeat, we have now come back to the idea that the Federal Government, via the Supreme Court, of all things, should control this area. I think they would be appalled at that notion. Jefferson would have been most appalled at the idea that the Supreme Court of the United States should be the one to dictate appropriate religious activities in State and local schools.

So I don't think the thrust of the amendment is particularly, if you will, radical or revolutionary; I think it is as consistent with the fundamentals of Madisonian federalism and of Jeffersonian confidence in State and local government, as anything we have.

So I would agree with you, I am willing to trust State and local governments. And, as for the chamber of horrors that might be conjured up as to the terrible things they could do, I doubt if it would ever materialize. Again, I think in a democratic system of our kind that State and local government could handle this particular issue.

So, on the problem you were anguishing over, how we might project how every facet and detail of this amendment would work out—if you have enough confidence in grassroots democracy at State and local level to allow it to run local schools, I am willing to allow it to make sensitive and difficult decisions regarding educa-

tion, regarding religious practice. Some are not willing to take that risk.

Certainly it is elitism to say, "We couldn't dare trust the souls to do this sort of thing, we'd best do it for them—no, one better, let's let the Supreme Court do it and the Federal courts—they could not err, they are beyond reproach, they are beyond touching, we couldn't withdraw their jurisdiction." Some would say we couldn't amend the Constitution. On your point, Senator Specter, about amending the Constitution to overrule Supreme Court decisions, we have done it through the 16th amendment, we did it through the 14th amendment, we did it through the 11th amendment. How else does one alter one of their decisions unless it's through the jurisdictional route or some invitation to get them to reconsider a decision? And I don't think anyone would want to concede we are impotent to do that. One cannot possibly contend that a decision of the Supreme Court of the United States cannot actually be altered in some way. The amendment route is certainly one that is available. I don't see how one gainsays that proposition. And, again, we have precedent for it in any case.

So I am in accord, obviously, with the basic thrust of what you are talking about, and not particularly disturbed with trusting State and local government.

Mr. SCHMULTS. I would like to add only one thing, if I could, Senator. It seems to me—I agree with what you said—the thrust of this amendment is to place those delicate decisions about the composition of prayer and how people can be excused, and so forth, in the hands of local communities, because, in part, there is no need for national uniformity on this question. The religious beliefs, the composition of the community from a religious standpoint, of course, changes from place to place in the United States.

Second of all, it's worth mentioning that we really have a long tradition of deep tolerance of religious differences in this country, and so, therefore, I think it is appropriate to place great confidence in the wisdom of people at the local level. But—and this is an important "but"—nevertheless there is, we think, full and adequate constitutional protection for those who differ with the majority. Our amendment would not touch in any way the free exercise clause of the first amendment—that is the one that provides, "Congress shall make no law prohibiting the free exercise of religion." Second of all, we have a sentence in our proposed amendment that says, "No person shall be required by the United States or by any State to participate in prayer."

So there is a careful, full, complete protection for those who do not want to participate in voluntary prayer in public schools. And we think that those protections are adequate, are consistent with our traditions, and, at the same time, they do not prevent the majority, which is what is happening today, from carrying into effect their thoughts on our traditions and heritage and conducting voluntary prayers in public schools. We really see no reason why it should be prohibited.

Senator EAST. Thank you, Mr. Schmuls.

[The prepared statement of Mr. Schmuls and summary of President Reagan's message on school prayer follow:]

PREPARED STATEMENT OF EDWARD C. SCHULTS

Mr. Chairman and Members of the Committee:

I am pleased to appear today on behalf of the Administration to support Senate Joint Resolution 199, a resolution proposed by the Administration and introduced in the Senate by Chairman Thurmond and Senator Hatch. This resolution proposes an amendment to the Constitution to restore the right to engage in prayer in our public schools and institutions.

The President feels strongly that Congress should support this proposed amendment and should act on it as quickly as possible. We would ask that the Committee work toward passage this session so that the states can begin the process of ratification before the end of the year.

In my statement, I will explain why this amendment is a sound and necessary solution to the problems resulting from the prohibition of prayer in our public schools and institutions. Mr. Chairman, I would also like to submit for the record a copy of the Administration's Analysis of this amendment, and I ask that it be printed together with my statement.

I.

The President has proposed this amendment in order to permit, once again, voluntary prayer in public schools and other public institutions. It is intended to reverse the effect of two decisions of the Supreme Court, Engel v. Vitale, 370 U.S. 421 (1962), and Abington School District v. Schempp, 374 U.S. 203 (1963), which held that it is an impermissible "establishment of religion" in violation of the First Amendment for a state to foster group prayer or Bible readings by students in public schools.

In Engel v. Vitale, the Court embraced an interpretation of the First Amendment that prohibited recitation of the New York State Regents' prayer in the public schools. Although it was clear that students were not required to participate in the prayer, the Court determined that state sponsorship and endorsement of a particular prayer violated the Amendment's

proscription against an establishment of religion. In Abington School District v. Schempp, the Court struck down Pennsylvania and Maryland laws requiring that public schools begin each day with readings, without comment, from the Bible. Although the state's practices furthered secular purposes and excused unwilling students from participation, the Court found them to violate the Establishment Clause. Emphasizing the strict separation between church and state adopted in its previous constructions of the First Amendment, the Court concluded that the Establishment Clause precluded the government from favoring religion as against non-believers.

The prohibition against favoring religion as against non-believers, some have argued, would appear to preclude any action by the states or the federal government affirming a belief in God. Thus, in the view of many Americans, the one provision of the Constitution expressly intended to protect the religious liberty of the people has instead been construed to prevent them from expressing their religious beliefs through prayer.

In the years following Engel v. Vitale and Abington School District v. Schempp, the courts have increasingly restricted the states from incorporating religious observances into the daily schedule of students in public schools. In one case, for example, a school principal's order forbidding kindergarten students from saying grace before meals on their own initiative was upheld. ^{1/} In another case, the Supreme Court affirmed a lower court decision striking down a school board policy of permitting students, upon request and with their parents' consent, to participate in a one-minute prayer or meditation at the start of the school day. ^{2/}

The principles established in Engel v. Vitale and Abington School District v. Schempp have been extended recently to bar the accommodation or even toleration of students' desire to pray on

^{1/} Stein v. Oshinsky, 348 F.2d 999 (2d Cir.), cert. denied, 382 U.S. 957 (1965). See also DeSpain v. DeKalb County Community School District, 384 F.2d 836 (7th Cir. 1967), cert. denied, 390 U.S. 906 (1968).

^{2/} Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981), aff'd mem., 102 S. Ct. 1267 (1982).

school property even outside regular class hours. For example, one court prevented a school from allowing students to conduct voluntary meetings for "educational, religious, moral, or ethical purposes" before or after school, even though other, non-religious groups may do so. 3/ Other courts have forbidden voluntary prayer meetings, 4/ even the reading of prayers from the Congressional Record. 5/

• Even the venerable tradition of having chaplains open legislative sessions with a prayer -- a tradition going back before the First Congress and widely followed in the states -- is now under serious attack in the courts. One federal court of appeals has already ruled that it is unconstitutional for a state legislature to have a chaplain to open its sessions with a prayer. 6/ A similar challenge to chaplains in Congress is now pending. 7/

II.

• Against the background of these decisions, the President has proposed a constitutional amendment that will, in his words, "restore the simple freedom of our citizens to offer prayer in our public schools and institutions." The pressing need for this amendment is apparent from numerous considerations.

• In reversing the two principal Supreme Court decisions foreclosing prayer in public schools, the Administration's proposed amendment would restore prayer to a place in public life consistent with the Nation's heritage and, in our view, would accurately reflect the historical background of the Establishment

3/ Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F.2d 1038, 1042-48 (5th Cir. 1982); see also Brandon v. Board of Education, 635 F.2d 971, 977-79 (2d Cir. 1980), cert. denied, 102 S. Ct. 970 (1981); Trietley v. Board of Education, 65 A.D.2d 1, 409 N.Y.S.2d 912 (1978).

4/ Collins v. Chandler Unified School Dist., 644 F.2d 759 (9th Cir.), cert. denied, 102 S. Ct. 322 (1981).

5/ State Board of Education v. Board of Education, 108 N.J. Super. 564, 262 A.2d 21, aff'd, 57 N.J. 172, 270 A.2d 412 (1970), cert. denied, 401 U.S. 1013 (1971).

6/ Chambers v. Marsh, 675 F.2d 228 (8th Cir. 1982).

7/ Murray v. Buchanan, 674 F.2d 14 (D.C. Cir. 1982), vacated for rehearing en banc, No. 81-1301 (D.C. Cir.).

Clause. The Administration's analysis of the proposed amendment demonstrates that the Establishment Clause was not intended to prohibit governmental references to or affirmations of belief in God. In discussing the scope of the Establishment and Free Exercise Clauses, Erwin N. Griswold, former Dean of Harvard Law School and former Solicitor General of the United States, stated: "These are great provisions, of great sweep and basic importance. But to say that they require that all traces of religion be kept out of any sort of public activity is sheer invention." ^{8/} And Justice Story concluded that "[a]n attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation" at the time the First Amendment was drafted. ^{9/}

Second, this amendment reflects and reinforces this country's long history of recognizing the existence of a deity to whom humility and thanksgiving are due. For over 170 years, prayers or Bible readings were a familiar part of the school day for American children, and were viewed as an appropriate expression of humility and gratitude for the blessings which had been bestowed upon this nation and its people.

Our country's most important public documents and occasions have traditionally been marked by a recognition of our dependence on a Supreme Being. For example, references to God can be found in the Mayflower Compact of 1620, the Declaration of Independence, the Pledge of Allegiance, and the National Anthem; on the Liberty Bell, the American Seal, our legal tender, monuments such as the Tomb of the Unknown Soldier, the Washington Monument, and the Lincoln and Jefferson Memorials; and in the oath of office taken by federal employees (including the President, all federal judges and members of Congress) and witnesses in judicial and legislative proceedings. American institutions have continued to reflect these religious beliefs as evidenced by the employment of

^{8/} Griswold, Absolute is in the Dark--A Discussion of the Approach of the Supreme Court to Constitutional Questions, 8 Utah L. Rev. 167, 174 (1963).

^{9/} 3 J. Story, Commentaries on the Constitution of the United States, § 1868 (1833).

chaplains in the legislatures and the armed forces, the proclamations and Inaugural Addresses made by almost every President, and the public recognition of Thanksgiving Day as a time set aside to express gratitude to a Supreme Being. Virtually all of the state constitutions refer to dependency on God. As the Supreme Court has stated, "We are a religious people whose institutions presuppose a Supreme Being." ^{10/}

Third, and closely related to the second point, this amendment is needed because the free expression of prayer is of such fundamental importance to our citizenry that it should not be proscribed from public places. The overwhelming majority of Americans have repeatedly made it clear that they favor a restoration of voluntary prayer to the public schools. Prayer in the public schools has long been considered a desirable and proper means of imparting constructive moral and social values to schoolchildren, while generally encouraging in them a practice of self-reflection and meditation. Conversely, the exclusion of prayer from the daily routine of students could convey the misguided message that religion is not of high importance in our society.

Fourth, by prohibiting students' voluntary prayers before meals, periods of meditation before class, and student prayer meetings in school buildings outside of class hours, the courts' concern with the Establishment Clause has overshadowed the First Amendment right of students to free exercise of religion. As Justice Stewart has stated, "there is involved in these cases a substantial free exercise claim on the part of those who affirmatively desire to have their children's school day open with the reading of passages from the Bible." ^{11/} Although some may argue that those parents could pay to send their children to private or parochial schools, the Supreme Court has stated that "[f]reedom of speech, freedom of the press, freedom of religion

^{10/} Zorach v. Clauson, 343 U.S. 306, 313 (1952).

^{11/} Abington School District v. Schempp, 374 U.S. 203, 312 (1963) (Stewart, J., dissenting).

are available to all, not merely to those who can pay their own way." 12/

Fifth, the unintended but inevitable result of current judicial interpretations of the Establishment Clause is not state neutrality but a complete exclusion of religion which is, in effect, state discouragement of religion. The governmental "neutrality" mandated by the Supreme Court on matters of religion has proven in fact to be unachievable.

Finally, the amendment is needed because it would allow decisions of essentially local concern to be made by states and localities rather than the federal judiciary. For over 170 years, school prayer issues were resolved at the state and local levels by the residents of the affected communities. Their choices regarding school prayer reflected the desires and beliefs of the parents and children who were directly and substantially affected.

III.

The proposed constitutional amendment is essentially intended to restore the status quo with respect to the law governing prayer in public schools that existed before Engel v. Vitale and Abington School District v. Schempp were decided, i.e., when prayers such as the Regents' prayer and readings from the Bible without comment were not thought to be unconstitutional. However, the proposed amendment affirms the fundamental right of every person to reject any religious belief, as he or she deems fit, and not participate in the expression of any religious belief.

By establishing that "Nothing in this Constitution shall be construed to prohibit individual or group prayer," the proposed amendment would make clear that the Establishment Clause of the First Amendment could no longer be construed to prohibit the government's facilitation of individual or group prayer in public schools. The amendment also would foreclose reliance upon the "implied coercion" theory advanced by the courts, which presumes

12/ Id. at 312-13, quoting Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943).

that any group prayer by consenting students has a coercive effect upon the objecting students in violation of their right to free exercise of religion, and that therefore no prayer is constitutionally permissible. However, as discussed below, the proposed amendment expressly protects the right of objecting students not to participate in prayer. This provision is sufficient to protect the rights of those who do not wish to participate without denying to all others who desire to pray an opportunity to do so.

The intent of the proposed amendment is to leave the decisions regarding prayer to the state or local school authorities and to the individuals themselves, who may choose whether they wish to participate. The proposed amendment would not require school authorities to allow or participate in prayer, but would permit them to do so if desired. Group prayers could be led by teachers or students. Alternatively, if the school authorities decided not to take part in a group prayer, they would be free to accommodate the students' interest in individual or group prayer by permitting, for example, prayer meetings outside of class hours or student-initiated prayer at appropriate, nondisruptive times, such as a brief prayer at the start of class or grace before meals. School authorities could, of course, develop reasonable regulations governing the periods of prayer, in order to maintain proper school discipline.

If the school authorities choose to participate in a group prayer, the selection of the particular prayer -- subject of course to the right of those not wishing to participate not to do so -- would be left to the judgment of local communities, based on a consideration of such factors as the desires of parents, students and teachers and other community interests consistent with applicable state law. Thus, the proposed amendment would restore the practice maintained throughout most of this nation's history, in which the determination of the appropriate circumstances of prayer was made by state and local authorities. The amendment does not limit the types of prayer that are constitutionally permissible and is not intended to afford a basis for intervention by federal courts to determine whether or

not particular prayers are appropriate for individuals or groups to recite. Because the proposed amendment merely would remove the bar of the Establishment Clause as construed by the Supreme Court, state laws regarding the availability of prayer in public schools would not be affected.

The amendment by its terms is not limited to public schools, and would apply to prayer in other public institutions as well. The intent of this language is to make the remedial provisions of this amendment coextensive with the reach of the First Amendment's Establishment Clause as construed by the Supreme Court. Although most questions relating to public prayer arise in the context of public schools, the proposed amendment is drafted to apply to prayer in other public institutions, including prayers in legislatures.

The second sentence of the proposed amendment guarantees that no person shall be required to participate in prayer. This prohibition assures that the decision to participate in prayer in public schools and other public institutions will be made without compulsion. Those persons who do not wish to participate in prayer may sit quietly, occupy themselves with other matters, or leave the room. Reasonable accommodation of this right not to participate in prayer must be made by the school or other public authorities. Thus, the exercise of the right to refrain from participating cannot be penalized or burdened.

The guarantee against required participation in prayer parallels and reaffirms the protection already afforded by the Free Exercise Clause of the First Amendment. Thus, the second sentence of the proposed amendment assures that students and others will never have to make a forced choice between their religious beliefs and participation in a state-sponsored prayer. Indeed, the second sentence of the proposed amendment provides greater protection than the Free Exercise Clause, because a person desiring not to participate in prayer need not show a religious basis for his belief. Accordingly, there would be no need for an inquiry into the religious basis for a person's decision not to participate in prayer.

The fact that one or more students do not wish to participate in prayer, however, would not mean that none of the students would be allowed to pray. The provision forbidding required participation in prayer is intended to be sufficient to protect the interests of those students. As the Supreme Court stated with respect to the Pledge of Allegiance, "the refusal of these persons to participate in the ceremony does not interfere with or deny the rights of others to do so." ^{13/} This would be the proper rule to apply with respect to school prayer: persons who do not wish to participate in prayer should be excused or may remain silent, but that should not interfere with or deny the rights of others who do wish to participate.

IV.

For these reasons, we strongly urge prompt action on this proposed amendment, so that the process of state ratification can begin. We began our national history with an unforgettable Declaration that governments were instituted in order to secure to the people those inalienable rights, including life, liberty and the pursuit of happiness, with which people were "endowed by their Creator." Those rugged and inspired individuals who founded this nation understood the importance of recognizing the source of our blessings. It is time that we restore the ability of our schoolchildren to do so as well.

Mr. Chairman, I shall be glad to answer any questions you or members of the Committee might have.

^{13/} West Virginia State Board of Education v. Barnette, 319 U.S. 624, 630 (1943).

SUMMARY OF PRESIDENT REAGAN'S
MESSAGE ON SCHOOL PRAYER

In a message to Congress today, President Reagan submitted the language of a proposed Constitutional amendment "to restore the simple freedom of our citizens to offer prayer in our public schools and institutions."

(The text of the President's message, the language of the proposed amendment, and an analysis of the legal issues involved are attached.)

NEED FOR THE AMENDMENT

The Supreme Court ruled in 1962 and 1963, in two separate cases, that prayer as traditionally practiced in public school classrooms violated the Constitutional prohibition against the "establishment of religion."

The President's proposed amendment would remove the obstacle to school prayer established in these cases:

- it would do so in a way that is not only consistent with the First Amendment but accurately reflects the intent of the Founding Fathers;
- it would recognize the fundamental importance Americans place on the free expression of prayer in public by lifting the ban on such expression.

PURPOSE OF THE AMENDMENT

- o The President seeks only a return to the situation before 1962 when voluntary prayer wasn't thought to conflict with the First Amendment.
- o The proposed amendment would provide two simple guarantees:
 - The federal government and the Constitution will not prohibit individual or group prayer in public schools or other public institutions;
 - the rights of those who choose not to participate in school prayer will be guaranteed and no one will be required to participate.
- o This is a nation under God. We proclaim it in our Pledge of Allegiance. We engrave it on our coins. The Congress and the Supreme Court acknowledge it at the opening of every session. President Reagan is only seeking to allow children who wish to, to make similar acknowledgement in their classrooms.

NOTE.-A copy of The Administration's Proposed Constitutional Amendment Relating to School Prayer appears in hearing of July 29, 1982.

Senator EAST. Senator Grassley, we would like to welcome you here.

Senator GRASSLEY. Well, thank you. I made a lengthy statement on this subject at the last hearing, so I have no further oral statement, but I do have a statement I want to put in the record, one page.

Senator EAST. We would be delighted to do that, and, without any objection, that will certainly be ordered. Also, I want to submit a statement of Senator Robert C. Byrd.

Senator GRASSLEY. Thank you.

[The prepared statement of Senators Grassley and Byrd follows:]

PREPARED STATEMENT OF SENATOR CHARLES E. GRASSLEY

Mr. Chairman, I offered a rather lengthy statement on the issue of voluntary prayer in the public schools at the previous hearing on July 29, 1982. At this time I have nothing further to add, in the form of a statement.

I would like to welcome all of our distinguished witnesses. It is certainly a pleasure to have the benefit of their views on this critical issue.

As a legislator, and as a citizen I am greatly interested in this subject. I hope that through these hearings we can shed some light on the true significance of the Supreme Court's decisions in *Engel* and *Abington*. It appears to me that there remains much confusion as to just what types of activities are outlawed by these decisions. Perhaps the most damaging consequences of these decisions have been their chilling effect on the policies of local school boards.

Before we can responsibly make any significant policy decisions, we must know precisely the status quo of the law. I commend the president for re-opening the forum on this matter. His leadership has prompted Congress, through these hearings, to carry out its proper investigative function.

I look forward to hearing this mornings testimony. I may have some specific questions for our witnesses later in these proceedings.

PREPARED STATEMENT OF SENATOR ROBERT C. BYRD

I would like to commend the Chairman and my other colleagues on the Judiciary Committee for devoting so much time and effort to the urgent and important subject of prayer in the public schools.

I have long espoused the view that our school children deserve the opportunity to take the time during their school day for spiritual reflection if they so desire. Unfortunately, however, a series of U.S. Supreme Court decisions, beginning in the early 1960's, have prompted considerable controversy surrounding this issue.

As the result of the confusion with respect to those rulings, I have consistently supported legislation in several sessions of the Congress that would facilitate the permit voluntary school prayer. Unfortunately, Mr. Chairman, the issue has still not been resolved, and it has now become clear that the people of this Nation are insisting that the Congress assume a responsibility to clear up this problem once and for all.

Article I of the Bill of Rights provides that "Congress shall make no law respecting to establishment of religion . . ." The history of that provision makes clear that its purpose was to enable the unfettered growth of religious faith in this country without allowing one particular religious group to use the power of the state to gain special advantage. Supreme Court decisions, however, have prompted the fear that the clause must be interpreted as prohibiting even voluntary school prayer. As a result, one school principal went so far as to forbid kindergarten children from saying grace before meals on their own initiative.

I do not believe that this was the kind of result which was intended by our Founding Fathers. That type of case suggests to me not that the Constitution assures that one religion will not be favored by Government over another, but that Government must actually take steps to prevent religious freedom. And if that is the case, then there has been a violation of another provision of the Constitution which requires that Government shall "make no law . . . prohibiting the free exercise thereof".

I have concluded that the only responsible solution for this problem would be to include in our Constitution a clear and unequivocal statement which would read as follows:

"Nothing in this Constitution shall be construed to prohibit voluntary individual or group prayer in public schools or other public institutions."

It is my judgment that such provision is desired by the people of this country. The hearings which this Committee is conducting are designed to enable us to come up with precise and meaningful language for the Congress to propose as a constitutional amendment for ratification by the states. Toward that end, I urge the Committee to consider the language which I have drafted.

I assure the Committee that in my Leadership capacity I shall make every effort to see that this matter is expeditiously handled by the full Senate.

Senator EAST. I am finished with any questions that I have of the Attorney General. As I say, the time is pressing upon us. Certainly we would be happy to yield to Senator Specter or Senator Grassley for any final questions you might have of the Attorney General. I am not discouraging it; I am not necessarily encouraging it.

Senator SPECTER. Are you neutral on that?

Senator EAST. Relatively so, yes. I would be happy to let you two gentlemen ask any additional questions you have, and then we will move on to Reverend Robertson.

Senator SPECTER. Thank you, Mr. Chairman, I have no further questions.

Senator EAST. Senator Grassley?

Senator GRASSLEY. No.

Senator EAST. Mr. Schmultz, I greatly appreciate your coming.

Mr. SCHMULTS. Thank you very much, Mr. Chairman, Senator Specter, Senator Grassley.

Senator EAST. Dr. Robertson, if you would like to come forward, please.

Dr. Robertson, we appreciate your patience this morning, and now we shall move promptly into your comments, if you would like to proceed. I would like to encourage you, consistent with, of course, making your remarks, to be as concise and as pointed as you can.

But, I don't wish to cut you short, and whatever you feel would be appropriate for your testimony, we would be delighted to hear. Thank you for coming.

STATEMENT OF M. G. "PAT" ROBERTSON, PRESIDENT, CHRISTIAN BROADCAST NETWORK, INC., VIRGINIA BEACH, VA.

Dr. ROBERTSON. Thank you very much, Senator East. I will try to summarize. I have a statement which has been presented to the committee in writing for inclusion in the record, so I will try to summarize.

But in light of what you were just saying, I would like to begin with two quotes from two very distinguished past Presidents, one of them Thomas Jefferson, the other one Abraham Lincoln.

Thomas Jefferson warned us, and I quote: "You seem to consider the judges as the ultimate arbiters of all constitutional questions—a very dangerous doctrine indeed, and one that would place us under the despotism of an oligarchy."

President Abraham Lincoln said the same thing in these words:

"If the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court the people will have ceased to be their own rulers. * * *

And I believe that the reason I am here, and others in support of this amendment, is because of the egregious interference of the Supreme Court and the lesser Federal judiciary into the legislative functions of the Federal Government. I believe personally that the first amendment to the Constitution was all the guarantee of religious liberties we needed until the activist Supreme Court of the past two decades has tortured its clear-cut meaning.

And if we might go back again into history to see the clear meaning, as has been brought out already in these hearings, the language of the first amendment says "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." When my forebears came to Virginia, they came beginning in 1619 and successive decades, they were Anglicans, members of the established church, but in the 18th century they joined the Baptist Church and were denied certain civil liberties. And these Virginians, and James Madison and Thomas Jefferson and others, determined that there would be no national church of one sect being preferred by the Government to the exclusion of others.

But they would have been appalled at the concept that public officials could not pray, that the Bible could not be read. And when their representatives met in Congress, they wrestled with the language, and one draft of the first amendment used these words: "Congress shall make no law establishing articles of faith or mode of worship, . . .," and that basically was the thrust when they brought forth that term "establishment of religion." But the same Congress that passed the first amendment had a chaplain, opened its proceedings each day with prayer, authorized the printing of Holy Bibles out of the public treasury, and affirmed a reliance on divine providence.

Now, we often hear the term "the constitutionally mandated separation of church and state," and, as we all know, that phrase does not appear in either the original Constitution or in the Bill of Rights. It was in fact a phrase used by Thomas Jefferson in 1802 when he wrote a letter, in some pique, because of criticism, to the Danbury Baptist Association, and when he later decided to clarify his position 3 years later in his "Second Inaugural Address," there was no mention of the phrase "separation of church and state." Instead, he used these words, and I quote:

In matters of religion, I have considered that its free exercise is placed by the Constitution independent of the powers of the general government. I have therefore undertaken on no occasion to prescribe the religious exercises suited to it [that is, the central government] but have left them, as the Constitution found them, under the direction and discipline of the church or state authorities.

And that, of course, is precisely what you have said, Senator East, earlier, that until recent decisions no one thought that the 14th amendment made the first amendment apply to State worship. It was a novel doctrine when brought forth in 1962.

There are, however, these words found in the constitution of another nation, and I quote: "The state shall be separate from the church, and the church from the school." Now, those words are not in the Constitution of the United States, but that of the Union of Soviet Socialist Republics, an atheistic nation sworn to the destruction of the United States of America.

Instead, the founders of our Nation, to paraphrase Supreme Court Justice Douglas, said we "were a religious people whose institutions presupposed the existence of a Supreme Being."

Well, since 1962, a small minority—we have used the term here, "elite"—has forced through the Federal court system a tortured view of the establishment clause of the first amendment which bears no resemblance to the views of the Founding Fathers of this Nation nor to the past 375 years of our history and custom. During the past 20 years, successive court decisions on the establishment clause have so egregiously departed from clearly defined norms of constitutional interpretation that Senator Daniel Moynihan termed these decisions, and I quote, "an intellectual scandal."

Now, we have only a few examples to understand the enormity of the problem. We are not dealing merely with the *Engel v. Vitale* case or the *Schempp* case; we are dealing with the interpretation of lower court cases over the past 20 years and of school officials. Here are just some of the examples that have come to my attention—there are hundreds more like these.

In the so-called *Widmar* case that was decided in December 1981 by the Supreme Court, the University of Missouri had ruled that they would accommodate all student groups—that would include communist groups and homosexual groups—but that a group of Christian students could not be accommodated because of the first amendment, as interpreted by the Supreme Court. In the lower court, the district judge ruled that, according to his interpretation of the Supreme Court's interpretation of the first amendment, that the freedom of religion was a restricted right—it no longer was an absolute right, it was a restricted right—and he upheld the University of Missouri. On appeal to the Supreme Court, they granted certiorari, and, fortunately, reversed that order, but within 2 weeks, they upheld the circuit court in the *Guilderland, N.Y.* case which denied identical rights to students at a high school where student clubs desired to meet after school on school premises to conduct voluntary prayer and discussions about religious matters, and the Supreme Court let stand a lower court ruling which said that was clearly unconstitutional.

In my home community of Virginia Beach, I was shocked to find that the State-run community college system had proposed a system of religious guidelines which forbade students to speak of their religion on campus to other students and forced students to submit all religious material for prior restraint and censorship before they would be allowed to distribute such literature voluntarily on their school campus. And, of course, if that was done to the *New York Times* or the *Washington Post*, it would be intolerable, the idea of prior restraint before publication, but that it was done to religious students in a State-run community college system, or at least those rules were proposed.

In Florida, and in many other States, Federal courts have ruled that observances of Christmas, Hanukkah, or Easter are unconstitutional.

But worse than that, a Federal court in a Florida case, *Chamberlin v. Dade County Board of Education* (377 U.S. 402) has ruled that the showing of films depicting various religious happenings were unconstitutional. And this was unconstitutional whether

these happenings were in modern contemporary life or in history. And, in short, the students in Florida could not view the landing at Jamestown because a cross was planted there; the first Thanksgiving of the Pilgrims, because they thanked God; George Washington kneeling in prayer at Valley Forge; or the Virginia patriots praying at Bruton Parish Church. Now, an amplification of that ruling is the Florida Commissioner of Education, October 25, 1977.

Last Christmas, in Pawtucket, R.I., the city was forced by Federal court order to remove a Christmas manger scene from the public square; it had been a time-honored holiday observance there. And the American Civil Liberties Union brought in someone from an adjoining jurisdiction, who was not even a citizen of Pawtucket, and forced through the court a deprivation of religious liberty, and then the plaintiff left the jurisdiction.

In Roanoke, Va., the Gideons International, who places free Bibles in the Nation's hotel rooms, were prohibited by court order from giving free Bibles to schoolchildren.

In Tennessee, the attorney general of the State has ruled that high school football teams are forbidden, under the Constitution of the United States, to engage in voluntary prayer before athletic contests.

A recent case in Lubbock, Tex., that was decided by the fifth circuit in March of this year, has ruled that all religious clubs have been denied freedom to meet in high schools. The basic reasoning of the court was because the Texas compulsory education machinery brings people together compulsorily, and once they are together, they no longer have the right to meet for voluntary religious observance.

Of course, the ultimate absurdity took place, Senator, in your State of North Carolina where the Supreme Court prohibited the State from printing on highway maps a simple nonsectarian prayer I guess warning drivers that it was dangerous to drive in the State of North Carolina, but it was a prayer asking for the protection of Almighty God on the highways of that State, and the Supreme Court struck that down as an establishment of religion.

But with these rulings has come confusion. The Supreme Court opens its session with this phrase: "God save this honorable court." Yet that act would be unconstitutional if it were said by a school principal.

The Supreme Court has the 10 Commandments engraved on the walls of its chambers, yet that act, the placement of those same 10 Commandments, is unconstitutional if it takes place in a school in Kentucky.

The Chief Justice of the Supreme Court holds a Bible for the swearing in of the President of the United States, yet it is unconstitutional for schoolteachers to read from the Bible in their classrooms.

The President of the United States designates a holiday for thanksgiving to God, yet no school child could thank God on that day if the school were in session.

The Congress and the President designate a day of prayer each year, yet the schools cannot give notice of such a joint action of the legislative and executive branches of the U.S. Government. And now, of course, the courts have begun to reach out and challenge

the right of the two Houses of Congress to hire chaplains and to open their sessions with prayer.

When my father, A. Willis Robertson, was a Member of this distinguished body, he met every Wednesday with colleagues to pray in the Senate dining room—and to him that was the highlight of his week. There were Senators from both sides of the aisles; they were enriched by fellowship, prayer, Bible study, and it was a great strength to him. It is my understanding, gentlemen, that if the recent Supreme Court decisions are constitutionally sound, the Senate prayer breakfasts are unconstitutional.

But if Senators have the privilege of praying and reading the Bible on Government property—and certainly they do—then little children should have the same privilege in the schools of our Nation.

Switching from some of the history and judicial interpretations to a few practical issues, just three I want to mention just very briefly. First of all, the decline in morality in America has crippled public education in many parts of this land. Since 1962 many of our public schools have become jungles. Some teachers show evidence of nervous disorders associated with battle fatigue. Drug use is epidemic. Large numbers of children as young as 10 and 11 are confirmed alcoholics. Over 600,000 babies are born out of wedlock to teenage mothers each year. Of the 3 million new cases of syphilis and gonorrhea, over half are teenagers. A new venereal disease, Herpes Simplex, thought to be incurable, has infected an estimated 20 million Americans, many of them teenagers and young adults.

Since 1962 the average of the Scholastic Aptitude-Test scores among the Nation's high school students has declined steadily every single year without exception. Many high school students are functional illiterates, unable to read a newspaper or to compute the correct change from simple purchases at a supermarket.

In short, without some kind of moral restraint, there can be no effective education.

Second, it is my contention that the functioning of a free society depends at its core on the inner moral restraints of its people. If a people lose their belief in God and their belief in the concept of ultimate rewards and punishment, they will refuse to practice the voluntary restraint and sacrifice needed to preserve freedom.

I want to assure you that the \$285 billion lost to the underground economy this year and the incessant demands on government by selfishly motivated special interest groups are just the beginning of what we will see if this Nation continues its turn away from God and His standards. Soon America will face a choice between anarchy or a dictatorship from the right or the left. As Benjamin Franklin put it, and I quote, "We will either be governed by God or we will be ruled by tyrants."

And, third, the American people overwhelmingly want a reversal of the antireligious court rulings of the past 20 years and the restoration of prayer and faith in our schools.

My personal polls on television, made from a sampling of people in 2,700 American communities, indicate that 96 percent of those responding favored a constitutional amendment to restore religious liberties. The Gallup and Harris polls have shown that approxi-

mately 73 percent of Americans favor an amendment to restore prayer in the public schools.

Some religious leaders have appeared before this committee in opposition to this amendment, but I am convinced that some of these officials do not speak for the rank and file of American people.

According to my friend, George Gallup, Jr., 94 percent of the people in America believe in God. Without question those who believe must give the 6 percent who do not believe freedom to speak, to write, to broadcast, to disagree. But I submit to this committee, I do not think that the believing majority owes any obligation to the disbelieving 6 percent minority to dismantle our entire public affirmation of faith in God, nor do we owe this 6 percent minority an absolute veto over a constitutional amendment which would reaffirm our freedom to address Almighty God in our schools and public places.

And, Senator East, you have pointed out so eloquently today the alternatives, and I would reaffirm the fact that our Constitution gives the Congress the freedom to propose amendments to the Constitution, to limit the appellate jurisdiction of the Federal court system, and to carry out the legislative function of the Federal Government.

And I would respectfully urge this committee to use all its constitutional powers to curb the intrusion of the Federal judiciary into the free exercise of religion in this country, and, as a first step, to approve Senate Joint Resolution 199.

Thank you.

Senator EAST. Dr. Robertson, I appreciate your remarks. I, too, had wanted to point out that your father, from the great State of Virginia, at one time had been a Member of this body, and a very distinguished and able Member of it as a matter of fact. And, obviously, you have gone on to great success in a career of your choosing—and I wanted to note that, too—so it's an honor to have you here this morning. And it does particularly increase that honor, knowing that your father had served with such great distinction here in the U.S. Senate. He would probably say that you have gone on to even greater and better things. One could make a very strong case for that.

I would make several observations based upon your testimony about this amendment, as valuable and as useful as it may be. It enjoys the support of a very broad spectrum of people in the United States, although I certainly appreciate it also has its opponents.

I think it's a little bit, though, a sign of our times—and an unfortunate sign of our times—that the issue should even be in question. I find it somewhat fascinating that we should be spending hours here in the U.S. Senate looking at a constitutional amendment which would permit voluntary prayers in the public schools of this country. I am sure if the framers were here, not to overromanticize the framers, but to understand as I understand their conception of what the first amendment and American federalism were, I think they would be appalled and wonder what in the world you good gents are doing sitting here arguing or debating. But here we are. We have noted here today the chilling effect of *Engel v. Vitale* plus

current recent cases—you have pointed them out—that do increasingly tend to demand the elimination of all vestiges of traditional religious belief in the public schools of the United States.

And I simply reemphasize a point I made before, not only could this trend be a contributing factor to a degree of very troublesome moral decline in this country, which you have so eloquently noted, but it brings us perilously close to the idea that the Supreme Court should be enforcing a national religion of nonbelief, that you can do everything else under the sun in the name of the first amendment on the public school grounds, but the moment that you do anything that would suggest an identity with, or connection to, the traditional religious values of the United States or of the Western World generally, that is forbidden. This, I would submit, as a practical matter, is state-enforced religion, the religion of secularism, the religion of nonbelief. Call it what you will.

And so I repeat: It occurs to me you have come full circle in which the central Government today in our Federal system does have an enforced national religion, the religion of nonbelief, the religion of materialism, of naturalism, of anything but traditional religious values.

Now, I think all I would request is maybe a little balance, equal time, a little more tolerant attitude, a return to the idea that varieties of points of view ought to be able to be expressed in our public schools, including traditional religious values. Why would they be excluded and all the rest encouraged, or permitted? I don't know. There is a certain perversity there, I would submit, with all due respect for contrary points of view.

Dr. ROBERTSON. I would agree with you, Senator, and point out that the very group that is the most vociferous about taking prayer and Bible reading and other religious occasions and observances away from our society is the one that is at the forefront of legalizing pornography, including child pornography, and establishing, quote, the constitutional rights of the youth to view x rated movies.

So there has been a reversal of our sociological and religious and moral values over the last hundred years; it is very profound and will have far-reaching consequences if we don't do something to stop it.

Senator EAST. I would like to make one final point on your comments. Again, I was suggesting one feels somewhat strange arguing here whether such a modest amendment as this would even be necessary; I would think that in an earlier period in American history it wouldn't even have been necessary to debate the issue.

Interestingly, last night, Senator Specter and I had the opportunity to be on the McNeil-Lehrer program on the abortion issue. The Senate is debating the abortion issue right now in the Chamber in connection with Senator Helms' proposal, and in due course they expect to get to a constitutional amendment that Senator Hatch is offering. My point is, it's curious, from the Senate's perspective, to see the subtle but profound transformation that is taking place in policymaking in the United States. Nowadays policymaking follows this scenario: The Supreme Court issues an edict, a policy decision, and that's it; it isn't deliberated through the normal political processes; the justices simply issue an edict declaring that the unborn will be unprotected under the Constitution

from conception to birth. That is the policy decision. Once the Supreme Court announces its decision it is imposed throughout the land. How do you change such an edict? Well, many people feel that the only way you can change it is through the amending process.

People are saying these days; well, you good chaps are spending too much time considering amendments to the Constitution. The reason we are is that the Supreme Court—totally out of keeping with what it ought to be doing, in my judgment—is making these major policy decisions, and one of the few ways we can get out from underneath the constitutional rubble is to utilize the amending process.

But you see what that does—it's a fascinating alteration in the Federal system, because now our power as a legislative body is now shared with States, and vice versa. In order to get an amendment through we have to have two-thirds votes here and ratification by three-quarters of the States; that is a very long and laborious process. And in effect increasingly major policy decisions in the United States are made today, one, on the initiative of the Court; two, on the efforts of the Congress and the States through the amending process to try to alter that policy.

But there are some people—and I know, of course, their intentions are honorable—who will simply say you shouldn't even amend, you shouldn't try to amend, there is no authority to amend, there isn't any precedent to amend. Well, of course, there is, it's there, we have established that such power exists.

If we do not have an alternative to the Supreme Court's edicts in this area, we have dramatically transformed the nature of the American system from a democratic republic to, frankly, an aristocracy.

Dr. ROBERTSON. That's right. That is what President Jefferson warned us against.

Senator EAST. Yes, and we would have come full circle on that point, just as he feared might happen. I don't wish to exaggerate the point, but I am saying that there is that tendency, and I see it here. In the 1½ years that Senator Specter and I have been here, we have spent an immense amount of time talking about proposed constitutional amendments on major policy questions to get out from under edicts of the Court. Under a more appropriate conception of the power of judicial review, the Court would have deferred these kinds of major policy judgments, as frankly the framers intended, including Jefferson, to the Congress or the States or a combination thereof. Let us work out our own destiny as a democratic republic on major policy questions and not have it imposed from on high with no alternative, but to amend the Constitution. Here we are dealing with a modest constitutional amendment on such a minor matter as a voluntary prayer in the public schools of America. What are we going to do when we get some of the other issues? We are going to have a Constitution 10 miles long because it's one of the few ways, not to overlook other alternatives, like regulation of court jurisdiction, to undo what the justices are doing. And that is, I suppose, the issue before the House here, that before we move ever further in the establishment of State-enforced secularism, the established religion of secularism, total, absolute, categorical, un-

bending, unyielding—before we move ever further in that direction, we should throw up one little caution light, namely, voluntary prayer. It's a very modest proposal.

And in terms of the broader issues, I too think there is a problem, a legitimate one, without overreacting or overstating the case, of a certain degree of moral degeneracy in the country today approaching somewhat alarming proportions: drugs, pornography, gratuitous violence. I think many Americans not confined to political party, nor to a particular section of the political spectrum—can only be concerned and alarmed about those particular developments. Pornography at the neighborhood theater has got to be of some concern. When we have youth who are very much threatened by a serious drug problem today, a problem that no one takes lightly or casually we see that something must be wrong. There are limits, I suppose, ultimately as to what government can do about all of that. But you get down to the fundamental problems of the moral quality of life in a society. And, as that first great political scientist, Plato, said: society is merely the individual writ large.

When we are no longer able to have such a modest thing as voluntary prayer in the public schools of the United States, it causes me to wonder whether the broader problem of moral decline is not a symptom of the continued secularization of this society. I don't have a simple answer to this question, nor am I trying to impose an answer, but I don't think it is an irresponsible or unreasonable posture to take—and I sense you are taking it—to suggest those trends are there. And I think we ought to have some public dialog on it, and we are—and I appreciate your coming today and being a part of it. I know you have a very demanding schedule, and I don't wish to keep you beyond the appointed hour. If you have any other comment or observation you would like to make, we would be happy to have it. Otherwise we will thank you again for coming.

Dr. ROBERTSON. Just one comment. The Connecticut Mutual Insurance Co., did a very revealing survey of American attitudes about 1 year ago that speaks to your particular point of view, and found, surprisingly so, that there were elites in America who held views contrary to the vast majority of the people on a number of moral issues. And the elites especially were found in the legal profession and in the judiciary, and their views were out of step with the vast majority of Americans as much as 80 to 20 percent, or vice versa.

Obviously it is easier for a small elite to get its will through one judge in one case than it would be to win an election at the ballot box and to get its representation through the legislature, which is what should be done, by the Constitution.

I think our cry would be for the legislature, the Senate and the House of Representatives, to exercise its constitutionally mandated powers as the representatives of the people.

That summarizes, I believe, my position.

Senator EAST. Well, again, we appreciate your coming, and we extend our best regards.

Dr. ROBERTSON. Thank you very much, sir.

[The prepared statement of Mr. Robertson follows:]

PREPARED STATEMENT OF M. G. "PAT" ROBERTSON

I would like to express my thanks to you, Senator Thurmond and to all the members of this distinguished Committee, for the opportunity to appear before you in support of Senate Joint Resolution 199 to amend the Constitution of the United States in order to restore the freedom of our citizens to join in voluntary prayer in public schools and in other public institutions.

The first amendment to the Constitution was drafted by a Virginian, James Madison. He, and other framers of our Constitution realized the oppression that had resulted in Europe and in the Colonies when the secular state chose to support one religious sect to the exclusion of others.

My ancestors arrived in Virginia from England during several decades beginning at Jamestown in 1619. Originally they were Anglicans. When some become Baptists in the eighteenth century they resisted paying taxes to support the salaries of Anglican clergymen and the maintenance of Anglican church buildings. The Anglican church in Virginia was the established church and my Baptist ancestors were deprived by the state of certain civil liberties because they were religious dissenters.

My forebears along with James Madison, other Virginians, and colonists from other states were determined that the Congress of the United States would not have the power to establish a federal church, or to restrict the religious freedom of any of our citizens.

As their representatives in the Senate wrestled with the matter, one draft of the First Amendment used this language:

"Congress shall make no law establishing articles of faith or mode of worship, or prohibiting the free exercise of religion."

Later both houses of Congress settled on a simpler formula:

"Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

To them the meaning was clear. The federal government could

not have the power to prefer one sect over another as was the case in Europe, and the federal government could not interfere with anyone's right to worship as he or she saw fit.

The same Congress which proposed the first amendment had a chaplain, opened its proceedings each day with prayer, authorized the printing of Bibles out of the public treasury, and affirmed a reliance on "divine providence."

We often hear of the "constitutionally mandated separation of church and state." Of course, as you know, that phrase appears nowhere in the Constitution or the Bill of Rights. It was, in fact, a phrase used in a letter by Thomas Jefferson sent in 1802 to the Danbury Baptist Association, which had aroused his ire by criticism of one of his policies.

When Jefferson desired to clarify his position three years later in his second inaugural address there was no mention of "separation of church and state." Instead he used these words:

"In matters of religion I have considered that its free exercise is placed by the Constitution independent of the powers of the central government. I have therefore undertaken on no occasion to prescribe the religious exercises suited to it (i.e. the central government) but have left them, as the Constitution found them, under the direction and discipline of the church or state authorities."

We do find this phrase in the constitution of another nation, however, "The state shall be separate from the church, and the church from the school." Those words are not in the Constitution of the United States, but that of the Union of Soviet Socialist Republics -- an atheistic nation sworn to the destruction of the United States of America.

The founders of this nation, to paraphrase the words of Supreme Court Justice Douglas in *Zorach v Clauson*, "were a religious people whose institutions presupposed the existence of a Supreme Being."

In fact, from the first settlement on these shores in 1607 to the founding of a nation in the late Eighteenth Century, until 1962,

there existed throughout our national and local life a profound belief in God, in the efficacy of private and public prayer, and in a shared morality based on the teachings of the Old and New Testament. Never was there to be separation from our public life of God, of prayer, of Judeo-Christian moral values.

From 1962 until the present, a small minority has forced through the Federal Court system a tortured view of the Establishment of Religion Clause of the First Amendment which bears no resemblance to the views of the founding fathers of this nation nor to the past three hundred and seventy five years of our history and custom.

During the past twenty years, successive court decisions on the establishment clause have so egregiously departed from clearly defined norms of constitutional interpretation that Senator Daniel Moynihan termed these decisions "an intellectual scandal."

By 1982, under the incessant hammering by groups such as the American Civil Liberties Union, a group formed 62 years ago to defend Bolsheviks, religious freedom is no longer considered a paramount freedom but has become restricted and proscribed by successive court decisions.

We have only to consider a few examples to understand the enormity of the problem:

(1) The University of Missouri provided at public expense accommodation for student groups advocating communism and homosexuality. The University denied similar accommodation to Christian students. The Federal District Court judge in the case agreed with the University and ruled that under the Constitution the freedom of religion was a restricted right. Fortunately, even the Supreme Court could not accept that reasoning and ordered the accommodation of the Christian student group.

Yet within two weeks the high court refused to overturn the ruling in the *Nederland*, New York case which denied the right of high school students to be accommodated for voluntary religious activities after school, even though all other volunteer student clubs were accommodated by the school.

(2) In my home community I was shocked to find the state run community college system proposed religious guidelines which forbade students to speak of their religion on campus and which forced students to submit all religious materials for prior restraint and censorship before they would be allowed to distribute such literature voluntarily on their school campus.

(3) In Florida, and in many other states, Federal Courts have ruled that observances of Christmas, Hanakkah, or Easter are unconstitutional.

But worse than this, a federal court in a Florida case, *Chamberlin v Dade County Board of Public Instruction* 377 US 402, 84 S.Ct. 272, has ruled that the showing of films depicting various religious happenings in the history of our nation were unconstitutional. In short, in Florida the students could not view the landing at Jamestown because a cross was planted there; the first Thanksgiving of the Pilgrims in Massachusetts because they thanked God; George Washington kneeling at prayer at Valley Forge; or the Virginia patriots praying at Bruton Parish Church. (See ruling from Florida Commissioner of Education, Oct. 25, 1977)

(4) Last Christmas, Pawtucket, Rhode Island was forced by federal court order to remove a Christmas manger scene which had been a time-honored holiday observance there.

(5) In Roanoke, Virginia the Gideons International, who place free Bibles in the nation's hotel rooms, were prohibited by court order from giving free Bibles to school children.

(6) And in the ultimate judicial absurdity the State of North Carolina was prohibited from printing on highway maps a simple non sectarian prayer dealing with safety for drivers on the state's highways.

But with these rulings has come confusion. The Supreme Court opens its session with the phrase, "God save this honorable court." Yet that act would be unconstitutional if said by a school principal.

The Supreme Court has the Ten Commandments engraved on the

walls of its chambers, yet the Supreme Court has ruled that the placement of the Ten Commandments on school walls is unconstitutional when it takes place in Kentucky.

The Chief of Justice of the Supreme Court holds a Bible for the swearing in of the President of the United States, yet it is unconstitutional for school teachers to read from the Bible in class.

The President of the United States designates a holiday for thanksgiving to God, yet no school child could thank God on that day if school were in session.

The Congress and the President designate a day of prayer each year, yet the schools cannot give notice of such a joint action of the Legislative and Executive Branches of Government.

Now the courts have begun to reach out and challenge the right of the two houses of Congress to hire chaplains and to open their sessions with prayer.

When my father, A. Willis Robertson, was a member of this distinguished body, he met with various colleagues every Wednesday morning in the Senate Dining Room to read the Bible and pray. This to him was the highlight of his week. The fellowship and prayer with Senators from both sides of the aisle was a great strength to him and to those Senators with whom he met.

I want to assure this committee, that if the recent Supreme Court decisions are constitutionally sound, then the Senate prayer breakfasts are unconstitutional. But if Senators have the privilege of praying and reading the Bible on government property -- and surely they do -- then little school children should be given the same privilege.

Thomas Jefferson warned us, "you seem to consider the judges as the ultimate arbiters of all constitutional questions -- a very dangerous doctrine indeed, and one that would place us under the despotism of an oligarchy."

President Abraham Lincoln told us, "If the policy of the government upon vital questions affecting the whole people is to be

irrevocably fixed by decisions of the Supreme Court...the people will have ceased to be their own rulers."

I believe that the First Amendment to the Constitution was all the guarantee of religious liberty we needed, until the activist Supreme Court of the past two decades tortured its clear cut meaning.

The Federal Court System has in our day become the unelected despotic oligarchy which Thomas Jefferson feared.

Leaving aside historic and legal precedent, may we consider three practical reasons why we need a constitutional amendment to assure prayer in our public life:

First, the decline in morality has crippled public education in many parts of America. Since 1962 many of our public schools have become jungles. Some teachers show evidence of nervous disorders associated with battle fatigue. Drug use is epidemic. Large numbers of children as young as ten and eleven are confirmed alcoholics. Over 600,000 babies are born out of wedlock to teenage mothers each year. Of the three million new cases of syphilis and gonorrhea over half are teenagers. A new venereal disease, Herpes Simplex, thought to be incurable, has infected an estimated 20,000,000 Americans, many of them teenagers and young adults.

Since 1962 the average of the Scholastic Aptitude Scores among the nation's high school students has declined steadily every single year without exception. Many high school students are functional illiterates -- unable to read a newspaper or to compute the correct change from simple purchases at a supermarket.

In short without moral restraint there can be no effective education.

Secondly, the functioning of a free society depends at its core on the inner moral restraints of its people. If a people lose their belief in God and their belief in the concept of ultimate rewards and punishment, they will refuse to practice the voluntary restraint and sacrifice needed to preserve freedom.

I assure this committee that the \$285 billion lost in taxes

to the underground economy and the incessant demands on government by selfishly motivated special interest groups are just the beginning of what we will see if this nation continues its turn away from God and His standards. Soon America will face a choice between anarchy or a dictatorship from the right or the left. As Benjamin Franklin put it, "we will either be governed by God or we will be ruled by tyrants."

Thirdly, the American people overwhelmingly want a reversal of the anti-religious court rulings of the past twenty years and the restoration of prayer and faith in our schools.

My personal polls made from a sampling of people in 2700 American communities indicates that 96% of those responding favored a Constitutional Amendment to restore religious liberties. The Gallup and Harris polls have shown that approximately 73% of Americans favor an amendment to restore prayer in the public schools.

Some religious leaders have appeared before this committee in opposition to this amendment. I am convinced that these church officials do not speak for the rank and file of the American people.

According to George Gallup, Jr. 94% of the people in America believe in God. Without question those who believe must give the 6% who do not believe freedom to speak, to write, to broadcast, to disagree. But I submit to this committee, I do not think that the believing majority owes any obligation to the disbelieving 6% minority to dismantle our entire public affirmation of faith in God, nor do we owe this 6% minority an absolute veto over a Constitutional Amendment which would reaffirm our freedom to address Almighty God in our schools and public places.

The Congress as the elected representatives of the people has been given the constitutional mandate to propose amendments to the Constitution; to limit the appellate jurisdiction of the Federal Court System; and to carry out the legislative function of the federal government.

I respectfully urge this committee to use all of its constitutional powers to curb the intrusion of the federal judiciary into the free exercise of religion in this country, and as a first step to approve Senate Joint Resolution 199.

Senator EAST. Because I need to go to the floor to vote, we shall proceed with testimony under the direction of our chief counsel, James McClellan. He will take the witnesses' testimony until other Senators arrive.

The next group appearing this morning is a panel consisting of Mr. Willard H. McGuire—I would appreciate his coming forward—and Mrs. Joanne Goldsmith. Mr. McGuire is president of the National Education Association, and Mrs. Goldsmith is executive director for the National Coalition for Public Education and Religious Liberty, both very accomplished and distinguished people in their areas.

I would like to welcome them this morning. I would also like to encourage the remaining panelists here to be as brief as they can, and you may rest assured that your written remarks will be made a part of the record.

I would like to thank personally each and every one of you for coming, and for being patient with the interruptions and the problems that always seem to beset us around here in the Senate from Tuesday through Thursday.

Mr. McClellan, if you will receive the testimony, I will be most appreciative.

Mr. McCLELLAN. We have to clear this room by 2 o'clock for another hearing, so I am going to have to ask each witness to try and confine his or her statement to 6 minutes, with the understanding, of course, that your full statement, if you have a prepared one, will be put in the record.

We have a light system here we use. The green light means go, the yellow light means caution, and the red light means that your time is up.

So, Mr. McGuire, if you would begin first.

STATEMENTS OF WILLARD H. MCGUIRE, PRESIDENT, NATIONAL EDUCATION ASSOCIATION, WASHINGTON, D.C., AND JOANNE GOLDSMITH, EXECUTIVE DIRECTOR, NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, WASHINGTON, D.C.

Mr. MCGUIRE. Thank you very much, Mr. McClellan. I am very pleased to have the opportunity to have the full testimony, and I will just give a summary.

My name is Willard McGuire, and I am president of the National Education Association. NEA represents some 1.7 million teachers and education support personnel throughout the United States.

I want to thank you for the opportunity to present the NEA's views on this most significant subject of prayer in the Nation's schools. We are especially pleased to be able to voice our opinion on school prayer, since it is our members, the Nation's public school teachers, who are in many ways at the center of this controversial debate. It is they who, if Senate Joint Resolution 199 passes the Congress and is ratified by the States, will become the conduits and spiritual guides who will essentially be forced into leading their students in daily prayer in the classroom. As such, it is my mandate, as spokesperson for NEA members, to express their strong ob-

jections to this constitutional amendment calling for prayer in the schools.

At the most recent meeting of the NEA's highest governing body, our representative assembly, held last month, its more than 7,500 elected delegates reaffirmed a resolution first passed by that same body in 1978, and is in the attached testimony. And I quote:

The National Education Association believes that the constitutional provisions on the establishment of and the free exercise of religion in the First Amendment require that there be no sectarian practices in the public school program.

The Association opposes the imposition of sectarian practices in the public school program and urges its affiliates to do the same.

Mr. Chairman, it is this resolution which holds the basis for NEA opposition to a constitutional amendment mandating prayer in the schools.

The NEA supports the 1962 Supreme Court decision in *Engel versus Vitale* on prayer in the public schools, a ruling that prohibited neither prayer nor Bible reading in the schools. What the decision did prohibit was the State sponsorship of prayer in the schools, or, to put it more bluntly, mandatory "voluntary" prayer.

That 1962 Supreme Court decision, and numerous lower Federal court rulings since then, have underscored the separation of church and State in this country, one of the founding principles on which this great Nation has been built. Indeed, the very first words of the Constitution's first amendment are emphatic: "Congress shall make no law respecting an establishment of religion." The 14th amendment carries the same restriction to State and local governments. And the Supreme Court has consistently and unequivocally upheld this wall of separation between church and State. It is clear, then, that these interpretations mean that the State, through its schools, must not sponsor religion.

Yet what President Reagan, in proposing the amendment, as well as other proponents of school prayer, are attempting to do, flies in the face of the courts' rulings, and, we believe, is unconstitutional.

Another key point on which the NEA opposes the adoption of a constitutional amendment on school prayer rests in its strong belief in the diversity of America. For example, currently all students are free to silently worship in whatever form they choose in the classroom. Whether the students belong to the Buddhist, Jewish, Hindu, or Muslim faiths, or any other number of religious minority groups in the country, their rights to their own prayer are not infringed upon in any way. If so-called voluntary group prayer becomes the law of the land, what becomes of this diversity? Who chooses what prayers shall be recited? And what happens to the current freedom to worship through one's own chosen prayer?

In another theme along these same lines, conservative columnist James Kilpatrick put it succinctly in a recent article published in the *Baltimore Sun*, and I quote:

... One problem with institutional prayer parallels the problem one often encountered with institutional food. The group prayers that would be sanctioned by this amendment would be canned peas—bland, innocuous, inoffensive recitations, perfunctory rituals devoid of spiritual meaning. Heartfelt prayer demands something more.

On top of the fact that this group prayer will undoubtedly be innocuous, it must be remembered that it is our members who will lead the prayer. But asking teachers, deeply religious or not, to stand at the head of a classroom to lead a prayer chosen by others is an infringement of their religious rights. In addition, as with students, teachers who choose not to pray are put into a precarious position. If they choose to exercise their constitutional rights and leave the classroom during prayer, there will most likely be a price to pay.

The NEA asks why there is a need to put students' and teachers' principles on the line when schools may use the Bible or other religious books as source books in religion classes; may offer a course in the Bible as literature and history; may offer instruction in comparative religion; may be rented in off-hours to religious groups. In addition, under current law, students may be allowed to leave school premises to receive religious instruction, and may study the history of religion and its role in civilization.

In closing, I urge this committee to reject the constitutional amendment on school prayer, and, by doing so, to keep religious diversity and liberty in its high position of importance in American society.

Thank you so much for this opportunity to be here today.

Mr. McCLELLAN. Thank you, Mr. McGuire. Mrs. Goldsmith?

Mrs. GOLDSMITH. Thank you, Mr. McClellan. I am Joanne Goldsmith, executive director of the National Coalition for Public Education and Religious Liberty. We call ourselves National Pearl. Our member organizations are dedicated to preserving religious liberty and the principle of separation of church and state and to maintaining the integrity and viability of public education. Our primary interest is in the protection of the guarantees of the First Amendment to the Constitution. We believe firmly that separation of church and state is good for schools and good for religion.

Thus, we oppose mandatory, organized prayer in the public schools. We think that prayer without a faith content deliberately planned to be inoffensive would be meaningless. Children are quick to notice that a prayer without faith is like cake without icing and would be certain to aid in alienating children from real commitment to faith. On the other hand, sectarian prayers lead to different problems. There are a lot of communities in this country where a non-Christian, a religious humanist, an agnostic or an atheist would find his children subjected to religious exercises and prayers quite at odds with his own beliefs. What happens in the Catholic community to the Baptist child, in the Jewish community to the Muslim's children. We are fortunate in this nation to have a diverse religious community. In that diversity is strength. Respect for the differences in our religious community is not going to be taught through mandatory organized schoolroom prayer. Rather the conflict between classroom teacher, the authority figure, and students will be the focus, and the results would be less than desirable for both religion and for public schools. It is inappropriate to ask or require our public school children to respond to the symbolism of public prayer. That kind of symbolism will not solve our many universal national problems.

Public schools have been asked to do many things. Surely the teaching of religion should not be one of its duties.

Several years ago, Leo Pfeffer, eminent constitutional and legal scholar, appeared before this committee. He was our legal counsel and has since retired. And I would like to take just a few minutes to pick out a few of his reasons for opposition to the proposed constitutional amendment. I will just be picking out some things from the prepared statement.

Fiction No. 2. There is only one Bible and all prayers are addressed to the same God. Therefore, it makes no difference which version of the Bible or what form of prayer is used in the public schools.

The fact. No controversy in human history has caused more persecution, oppression, and bloodshed than the question of what is the true word of God and which is the correct way to worship Him or Her. The victims of the Inquisition were persons who revered the same Bible and worshipped the same God as the Inquisitors; they suffered only because they worshipped in a different way. Unfortunately, it cannot be said that human nature has changed so dramatically in the intervening hundreds of years as to make religious persecution now unthinkable. It might now be less blatant, less brutal, but subtle persecution is persecution nonetheless.

Fiction No. 3. If a child has the right to be excused from participating in Bible reading or prayer recitation, there can be no valid objection to the practice.

Fact. There is a delusion of voluntarism. It is belied by history and recognized as a fiction by countless educators and other persons who know how children think and act. There is nothing voluntary about compulsory school attendance laws.

Finally, fiction 4. The Supreme Court has forbidden the mention of God or the Bible or religion in the public schools.

I think the most important thing for you to do is simply read the decision that we have been talking about this morning. I think they would answer the questions that have been commented on.

I would simply say, in closing, that the first amendment is based on the premise that the separation of church and state is best for the church and best for the state, and secures freedom for both.

For two centuries this assumption has proved valid. Religion today enjoys in the United States the highest degree of esteem, reverence, and influence anywhere in the world. It was the First Amendment which brought this about. The author of that amendment, James Madison, placed himself firmly in opposition to any impairment of its basic principles, no matter how slight, "because," he said, "it is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of the noblest characteristics of the late Revolution."

Retaining this "prudent jealousy," the American people have treated the Bill of Rights as unamendable. They have viewed it as a declaration of fundamental principles of government that must remain inviolate if our country is to remain free.

By rejecting this proposed amendment that is the subject of this hearing, this committee will protect from challenge the basic liberties that promise freedom to all Americans.

We thank you for the opportunity to be here this morning.

Mr. McCLELLAN. Thank you, Mrs. Goldsmith. Two questions I have.

Mr. McGuire, you mentioned that the NEA resolution comes out against sectarian practice. What exactly does the NEA mean by "sectarian practice"? Do you mean a specific religious sect?

Mr. McGuire. Certainly it would mean a prayer that produced a certain religious flavor, sectarian to the extent of Christian as opposed to Jewish or Buddhist or the rest. Or it could very much in a community be one particular Christian denomination to the exclusion of others.

Mr. McCLELLAN. The reason I ask that question is because in the *Engel v. Vitale* case the prayer that was used and that was the focus of contention was a nonsectarian prayer; in fact, Protestant, Catholic, and Jewish members of the clergy combined together to write the prayer, and it was not regarded by them as being preferential to any particular religious sect. A prayer that simply invoked the Almighty Himself without any further reference to any specific Protestant, or Catholic, or Jewish doctrine, is that still, in your estimation, a sectarian practice?

Mr. McGuire. Yes, the part of that that was in the *Engel v. Vitale* was the mandatory part of that. An innocuous prayer, in my opinion, is not a prayer at all—a prayer must be a heartfelt prayer of need and of faith. So there were two parts, really, to that—one part, of course, was the mandatory, which is the strongest part of our objection, and the other part is that almost any words you choose are sectarian in nature. Granted, the New York one was quite innocuous, and that would hardly make it a prayer at all.

So our objection is twofold: mandatory, for the most part, and sectarian, because it's very difficult to write a prayer that isn't sectarian.

Mr. McCLELLAN. Suppose it was simply a voluntary prayer, and those who wished to join in were free to do so, and those who wished to excuse themselves were free to do that also, and the prayer simply said: Thank you, God, for this lunch we have had today.

Is that a sectarian practice, according to the NEA resolution?

Mr. McGuire. Yes, I believe it is. There is a second part to that that is of very strong concern. Although the amendment says free to participate or not to participate, anyone who has been close to a school situation realizes very much the peer pressures that are put on to young people who either do or do not participate, depending what the norm turns out to be. And then the employment pressures that are put on the teacher, who is supposedly free to participate or not to participate, to lead or not to lead—there can be many pressures that are put on by the employer, just as there are pressures on the young people from their peers that just are not healthy and are not conducive to a good educational system.

Mr. McCLELLAN. So it is primarily the compulsion that seems to concern you most rather than the content of the prayer?

Mr. McGuire. Yes, certainly the compulsion factor is the overriding one. However, it is also the difficulty of not being sectarian within the Christian domain, and then certainly the whole concern of the diversity that we have, and especially more now in our coun-

try with the influx of immigrants of Buddhist and Muslim beliefs, and so on.

Mr. McCLELLAN. I gather from your statement also, Mrs. Goldsmith, that you share this view that it is the compulsory aspect of the prayer in the public school that concerns you most?

Mrs. GOLDSMITH. It certainly concerns us greatly.

Mr. McCLELLAN. Well, let me ask you this, then. Would you also be opposed to compulsory sex education in schools?

Mrs. GOLDSMITH. My organization does not have a position on compulsory sex education. There is, of course, through school boards, there is sex education in schools, and parents have an opportunity to participate in the evaluation of materials and choose to allow their children to participate or not. I think that is a slightly different circumstance than prayer in public schools.

Mr. McCLELLAN. Is that the position of the NEA also that compulsory sex education is fine, but compulsory prayers or prayers even of a voluntary nature are inherently compulsory?

Mr. McGUIRE. We favor sex education in the schools, that there be a good program from kindergarten through 12 of sex education, but the compulsory end of it is a matter where the parents themselves have a right in the public school system to have their children not participate in sex education.

Mr. McCLELLAN. Has the NEA taken a position against compulsory sex education?

Mr. McGUIRE. We favor that there be a sex education course, a comprehensive sex education course, in the schools, and not from a compulsory standpoint; we believe it should be there, and then if the parents should choose not to have their children involved in it, that would be their own choice.

Mr. McCLELLAN. I thank you both. I'm sorry, we have to move along to other witnesses. Thank you for coming.

Mr. McGUIRE. Thank you.

[The prepared statements and submissions of Mr. McGuire and Mrs. Goldsmith follow:]

PREPARED STATEMENT OF WILLARD MCGUIRE

Mr. Chairman and Members of the Committee, my name is Willard McGuire, and I am president of the National Education Association (NEA). The NEA represents some 1.7 millions teachers and educational support personnel throughout these United States.

I thank you for this opportunity to present the NEA's views on this most significant subject of prayer in the nation's schools. We are especially pleased to be able to voice our opinion on school prayer, since it is our members, the nation's public school teachers, who are in many ways at the center of this controversy. It is they who, if S.J. 199 passes the Congress and is ratified by the states, will become the conduits and "spiritual guides" who will essentially be forced into leading their students in daily prayer in the classroom. As such, it is my mandate as spokesperson for NEA members to express their strong objections to this constitutional amendment calling for prayer in the schools.

At the most recent meeting of the NEA's highest governing body, its Representative Assembly, held last month, its more than 7,500 elected delegates reaffirmed a resolution first passed by that same body in 1978 (see attached). It states:

"The National Education Association believes that the constitutional provisions on the establishment of and the free exercise of religion in the First Amendment require that there be no sectarian practices in the public school program.

"The Association opposes the imposition of sectarian practices in the public school program and urges its affiliates to do the same."

Mr. Chairman, it is this resolution which holds the basis for NEA opposition to a constitutional amendment mandating prayer in the schools.

The NEA supports the 1962 Supreme Court decision in *Engel v. Vitale* on prayer in the public schools, a ruling that prohibited neither prayer nor Bible reading in the schools. What the decision did prohibit was the state sponsorship of prayer in the schools, or, to put it more bluntly, mandatory "voluntary" prayer.

That 1962 Supreme Court decision, and numerous lower federal court rulings since then, have underscored the separation of church and state in this country, one of the founding principles on which this great nation has been built. Indeed, the very first words of the Constitution's First Amendment are emphatic: "Congress shall make no law respecting an establishment of religion." The Fourteenth Amendment carries the same restriction to state and local governments. And the Supreme Court has consistently and unequivocally upheld this wall of separation between church and state. It is clear, then, that these interpretations mean that the state, through its schools, must not sponsor religion.

Yet, what President Reagan, in advancing the amendment, as well as other proponents of school prayer, are attempting to do, flies in the face of the courts' rulings, and, we believe, is unconstitutional.

President Reagan campaigned and was elected with the supposed mandate of "getting government off the backs of the American people." Yet, his spearheading this effort to return "voluntary prayer" to the public schools is, in fact, in opposition to this mandate.

The NEA also feels that the current attempt to pass an amendment to the Constitution mandating "voluntary" prayer in the schools is part of a larger move to change social policy--a move I might add, supported predominantly by the right wing.

Moves to alter the U.S. Constitution in the past have mainly been attempts to expand individual rights and to increase the efficiency of the operation of government. Now, however, it appears that changes in this most precious of human documents are being sought to dictate social policy. It may be remembered that these same forces pushing for social change through the Constitution have for years had a hands-off attitude toward the judicial interpretation of law, denouncing it as a means to "dictate" social policy. Now, however, "dictating" their social

policy through changes in the Constitution is suddenly an acceptable practice. The NEA believes this is a dangerous--not to mention hypocritical--threat to the foundation of our government.

It is also ironic that at a time when greater efficiency and economy in government are being called for, this proposal will mean that teachers, who are paid to provide quality education to their students, have the actual amount of classroom time devoted to education decreased. I would like to quote here from a very thoughtful letter (see attached) received recently by the NEA, written by a woman, Mary Musgrave from West Fork, Arkansas, who is neither an NEA member nor a teacher, and who has strong concerns about this very issue.

...Foremost, however, is the conviction that they (teachers) are educators, not seminarians. They resent time taken from the first purpose, namely, to educate. This is not a small item, neither time or moneywise. At an average salary of \$12 an hour, based on a seven hour day, 36 week year, it will cost one dollar per teacher per day for a five minute session including the time needed to dismiss and recall non-participants. This figure would be \$2,300,000* daily, \$11,300,000 weekly and over \$400,000,000 annually. Nation-wide, 194,000 hours would be used each day for a non-academic purpose. *

The NEA strongly agrees with Ms. Musgrave's conclusion that decreasing the actual teaching time in the classroom is an inefficient use of teachers' time and taxpayers' money.

Another key point on which the NEA opposes the adoption of a constitutional amendment on school prayer rests in its strong belief in the diversity of America--a diversity that we are no longer sure President Reagan acknowledges or appreciates. For example, currently all students are free to silently worship in whatever form they choose in the classroom. Whether the students belong to the Buddhist, Jewish, Hindu, or Muslim faiths, or any other number of religious minority groups in the country, their rights to their own prayer are not infringed upon in any

*Ms. Musgrave's figures were arrived at assuming a total of 2.2 million public school teachers in the country. The NEA's official count is 2.2 million.

way. If so-called "voluntary" group prayer becomes the law of the land, what becomes of this diversity? Who chooses what prayers shall be recited? What happens to the current freedom to worship through one's own chosen prayer?

In another theme along these same lines, conservative columnist James Kilpatrick put it succinctly in a recent article published in the Baltimore Sun, and syndicated widely:

"... one problem with institutional prayer parallels the problem one often encountered with institutional food. The group prayers that would be sanctioned by this amendment would be canned, read--blind, innocuous, inoffensive recitations, perfunctory rituals devoid of spiritual meaning. Heartfelt prayer demands something more."

A column written by Samuel Shaffer, retired chief Congressional correspondent for Newsweek magazine, published last week in the Washington Post, underscores many of the important points made by Mr. Kilpatrick. (Both columns are attached to the statement.)

On top of the fact that this group prayer will undoubtedly be innocuous, it must be remembered that it is our teachers who will lead the prayer. I might note in an aside, that I'm quite certain that if public school teachers were removed from the nation's Sunday schools each week, we would find literally hundreds of thousands of empty seats in places of worship throughout the land.

But asking these same deeply religious people to stand at the head of a classroom to lead a prayer chosen by others is an infringement of their religious rights. In addition, as with students, teachers who choose not to pray are put into a precarious position. If they choose to exercise their constitutional rights and leave the classroom during prayer, there will most likely be a price to pay. I return to a relevant passage on this subject in Ms. Musgrave's letter:

"...I have no illusions as to ostracism of non-prayers by their peers. This same persecution will be visited upon teachers by the administration, school board, and eventually the community. Non-conforming teachers would

be forced out of their jobs and, indeed, their professions by majority opinion. Nothing is more personal than (sic) one's religious convictions. Teachers who have performed faithfully for years with no thought of bringing their religious beliefs to the attention of their pupils or co-workers will be forced to go public in a matter that should have absolutely no bearing on their ability as teachers. I cannot see how school administrations would be able to keep some type of religious determination out of their hiring practices if they are to avoid a continuous string of incidents and lawsuits involving dissident teachers. Ultimately, our schools would be staffed exclusively by the devout and the meek providing fertile ground for the predicted religious takeover."

The NEA asks why there is a need to put students' and teachers' principles on the line when schools:

- o may use the Bible or other religious books as source books in religion classes;
- o may offer a course in the Bible as literature and history;
- o may offer instruction in comparative religion;
- o may be rented in off-hours to religious groups.

In addition, under current law, students:

- o may be allowed to leave school premises to receive religious instruction, and
- o may study the history of religion and its role in civilization.

In closing, I urge this Committee to reject the constitutional amendment on school prayer, and by doing so to keep religious diversity and liberty in its high position of importance in American society without color of government mandate.

Thank you so much for this opportunity to be here today.

ATTACHMENT A

RESOLUTION FIRST ADOPTED BY THE NEA 1978 REPRESENTATIVE ASSEMBLY AND
REAFFIRMED IN 1979, 1980, 1981, AND 1982

H-6. Sectarian Practices in the School Program

The National Education Association believes that the constitutional provisions on the establishment of and the free exercise of religion in the First Amendment require that there be no sectarian practices in the public school program.

The Association opposes the imposition of sectarian practices in the public school program and urges its affiliates to do the same. (78, 79)

ATTACHMENT B

WEST FORK, ARK., *July 21, 1982.*

Congressman JOHN PAUL HAMMERSCHMIDT,
House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN HAMMERSCHMIDT: I am deeply concerned about the efforts by Jerry Falwell, Jesse Helms, et al. to bring about a constitutional amendment that would allow for prayer in our public schools. However, my fears extend into an area that has been deviously ignored by the Fundamentalists, that of teacher involvement should such an amendment become law.

Jerry Falwell's own figures show 75 percent of Americans favor school prayer and 25 percent do not. Let us apply these figures to members of the teaching profession. NEA and AFT have a combined membership of 2,300,000. Using Falwell's calculations, 1,725,000 would favor such an amendment but 575,000 would not.

Three members of my immediate family are long time teachers. I have discussed this issue with them at length and asked them to evaluate the attitudes of their fellow teachers. The consensus indicates that opposition to school prayer is higher among teachers than in the general population. Fundamentalism is not generally the religion of choice among better educated persons. Generally, a good education fosters respect for diversity of belief or unbelief. Foremost, however, is the conviction that they are educators, not seminarians. They resent time taken from the first purpose, namely, to educate. This is not a small item, neither time or moneywise. At an average salary of \$12 an hour, based on a seven hour day, 36 week year, it will cost one dollar per teacher per day for a five minute session including the time needed to dismiss and recall non-participants. This figure would be \$2,300,000 daily, \$11,500,000 weekly and over \$400,000,000 annually. Nationwide, 194,000 hours would be used each day for a non-academic purpose. I do not know how many unaffiliated teachers there are. If they had been included in these figures, calculations would be even higher.

My most urgent concern, however, is my belief that school prayer is simply a smoke screen, a first step to complete religious control of faculty and curricula in our schools. True proponents and those who are forced to choose hypocrisy over job loss will have little or no trouble, but what will happen to the teachers whose convictions are strong enough that they choose to "buck the system". Will those teachers be allowed to leave the majority of their pupils unattended and exercise their constitutional right by leaving the room with the 25 percent of students who are non-prayers? In schools without PA systems, will teachers be expected to lead prayers with no respect for their personal convictions? I have no illusions as to ostracism of non-prayers by their peers. This same persecution will be visited upon teachers by the administration, school board, and eventually the community. Non-conforming teachers would be forced out of their jobs and, indeed, their professions by majority opinion. Nothing is more personal than one's religious convictions. Teachers who have performed faithfully for years with no thought of bringing their religious beliefs to the attention of their pupils or co-workers will be forced to go public in a matter that should have absolutely no bearing on their ability as teachers. I cannot see how school administrations would be able to keep some type of religious determination out of their hiring practices if they are to avoid a continuous string of incidents and lawsuits involving dissident teachers. Ultimately, our schools would be staffed exclusively by the devout and the meek providing fertile ground for the predicted religious takeover.

I am not against prayer, only prayer on school time where at least 25 percent of pupils and teachers are unwilling participants. School buildings are used during

non-school hours for a vast variety of activities. I see no reason why an area of the building could not be used before or after school hours to allow students under willing adult supervision to gather for prayer. The 75 percent of parents and students who want school prayer would have it. What they would not have is the opportunity to embarrass and harass the 25 percent who do not want it.

Sincerely yours,

* MARY C. MUSGRAVE.

ATTACHMENT C

[From the Baltimore Sun, May 26, 1982]

FIRST, A MOMENT OF SILENCE

(By James J. Kilpatrick)

PRAYER IN SCHOOL

WASHINGTON.—President Reagan has just sent to Capitol Hill his proposed constitutional amendment on prayer in public schools. If wisdom and prudence prevail, the resolution will be quietly buried in the judiciary committees.

Sad to say, wisdom and prudence seldom prevail in an election year. This resolution will be a tough one to vote against. Mr. Reagan would write into the Constitution this provision:

"Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any state to participate in prayer."

Several things are wrong with this proposition. For one thing, "individual prayer" never has been prohibited by any court at any time. Nothing on earth prevents a school child from bowing his head over his desk and saying a silent prayer whenever he feels so disposed.

Neither have the courts had a word to say about prayer in "other public institutions." Over the years, various atheistic petitioners have complained of prayer in the houses of Congress, in state legislatures and at military installations. Sessions of the Supreme Court itself are opened with prayer: "God save this honorable Court." To the extent that the amendment seeks to authorize a custom that is nowhere prohibited, the amendment is quite simply unnecessary.

The issue involves one subject only: group prayer in public schools. That is what we are talking about, and it is all we are talking about. Let me argue a case against it.

First, on this matter of "voluntarism." The Reagan draft says, in effect, that no child should be required to participate in a group prayer. As a practical matter, the saving sentence has no meaning. Attendance at a public school is compulsory; the child has to be there. Few children ever would risk the conspicuous embarrassment of refusing to do what the teacher and other children are doing. Saying that classroom prayer is voluntary cannot make it so.

Second, the amendment's protection of "group prayer" plainly implies a structured, organized service of some kind. But what kind? Are state boards of education to provide an official prayer for use statewide? Is every local board to compose its own? Is the group to be led by individual teachers or pupils? Once we embrace the idea of "group prayer," we embrace laws respecting an establishment of religion. The First Amendment has prohibited such laws for nearly 200 years. Do we truly want to cast that long experience aside?

Third, one problem with institutional prayer parallels the problem often encountered with institutional food. The group prayers that would be sanctioned by this amendment would be canned peas—bland, innocuous, inoffensive recitations, perfunctory rituals devoid of spiritual meaning. Heartfelt prayer demands something more.

Mr. Reagan is quite in error in his view of the present state of the law. He says that the high court "has effectively removed prayer from our classrooms," but it is only institutionalized prayer that the court has condemned. The president says his amendment: "will restore the right to pray," but so far as the individual child is concerned, that right never has been suspended.

In his statement of May 6, the president asked a rhetorical question: "How can we hope to retain our freedom through the generations if we fail to teach our young that our liberty springs from an abiding faith in our Creator?" Some of us might respond by suggesting that our liberty springs from something else entirely. Our

free institutions may have been divinely inspired, but they are rooted in mortal instruments—the rule of law, the common defense, a written Constitution. Faith in our Creator is a thing apart, a matter of personal conviction, not of public policy.

Before we drift toward some quasi-state-sanctioned establishment of religion, let us have a long moment of meditative silence.

ATTACHMENT D

[From the Washington Post Aug. 12, 1982]

WHEN THEY PRAYED IN SCHOOL

(By Samuel Shaffer)

The continuing controversy about restoring public school prayers brings back memories of religion in the public schools of the District of Columbia in the 1920's, when I was attending grammar and high school here.

This was the compulsory procedure in the schoolroom before instruction began: first, we had to extend the right arm and hand, in a gesture afterwards adopted by Benito Mussolini, and pledge allegiance to the flag.

Then came the religious part of the morning's activities. Whether it was due to a rider on a D.C. appropriations bill slipped through Congress or a ruling by the D.C. school board was never explained to us.

First, the teacher had to lead the class in a recitation of the Lord's Prayer. This resulted in tension between the Protestant and Catholic children because the latter refused to say the concluding words: "For Thine is the kingdom and the power and the glory, forever and ever, Amen." After class, this led to taunts and occasional fistfights.

The first sentence of the prayer presented a curious difficulty for some of us who said, in our blessed ignorance: "Our Father who art in Heaven, Harold be thy name." It wasn't until years later, when I discovered H. L. Mencken, that I learned the Creator's name was Yahweh, not Harold, and that I should have said "hallowed."

This was followed by a reading from the Bible. The teacher could select any passage, but that passage had to be an entire chapter.

My section chief in high school was Carlos Blume, a German teacher, who, incidentally, was never seen to eat anything for lunch but cold fried egg sandwiches that he brought from his boarding house.

By his own admission, made privately to some favored students, Carlos Blume was "a village atheist." And so day after day he read the same chapter—Chapter 5 of the book of Genesis—thus obeying the letter of the law while utterly violating its spirit.

My memory is still haunted by some of the verses: "And Seth lived a hundred and five years and begat Enos: and Seth lived after he begat Enos eight hundred and seven years and begat sons and daughters: and all the days of Seth were nine hundred and five years: and he died."

And so we learned about the extraordinary life expectancy and conjugal vigor of Cainan (who began Mahalaleel) and Jared and Enoch (who begat Methusaleh). Always there came the dying fall: "And then he died."

We knew when those words would come and, spontaneously with Carlos Blume, we chimed in.

Thus inspired, we faced our scholarly tasks with renewed vigor and hope.

PREPARED STATEMENT OF JOANNE T. GOLDSMITH

Mr. Chairman and Members of the Committee, my name is Joanne Goldsmith, Executive Director of the National Coalition for Public Education and Religious Liberty (PEARL), representing 30 civil libertarian, educational and religious organizations, all of which support similar goals. A list of these organizations is attached to this statement.

Our member organizations are dedicated to preserving religious liberty and the principle of separation of church and state and to maintaining the integrity and viability of public education. Our primary interest is in protection of the guarantees of the First Amendment to the Constitution which speak to the basic right of all Americans to practice religion without government coercion, involvement or interference. We believe firmly that separation of church and state is good for schools and good for religion.

Thus we oppose mandatory, organized prayer in the public schools. We think that prayer without a faith content deliberately planned to be inoffensive would be meaningless. Children are quick to notice that a prayer without faith is like cake without icing and would be certain to aid in alienating children from real commitment to faith. On the other hand, sectarian prayers lead to different problems. There are a lot of communities in this country where a non-Christian, a religious humanist, an agnostic or atheist, would find his children subjected to religious exercises and prayers quite at odds with his own beliefs. What happens in the Catholic community to the Baptist child, in the Jewish community to the Muslims children. We are fortunate in this nation to have a diverse religious community. In that diversity is strength. Respect for the differences in our religious community is not going to be taught thru mandatory organized school room prayer, rather the conflict between classroom teacher and student will be the focus and the results less than desirable for both religion and for public schools. It is inappropriate to ask or require our public school children to respond to the symbolism of public prayer. Public schools have been asked to do

many things, surely the teaching of religion should not be one of its duties.

Several years ago, Leo Pfeffer, retired legal counsel to this organization, spoke on the issues now before this Committee. I would like to take just a few minutes to repeat a few of his reasons for opposition to the proposed constitutional amendment.

Fiction 1. Public school Bible reading and prayer recitations have been going on for a hundred and fifty years without objection. Opposition to these practices is a recent occurrence.

Fact: Strong and consistent efforts to eliminate devotional Bible reading in the public schools have been carried on for practically as long as there have been public schools in which devotional Bible reading was conducted. Formal opposition to the practice can be traced at least to the year 1840, when the Fourth Provincial Council of the Roman Catholic Church was held in Baltimore.

Fiction 2. There is only one Bible and all prayers are addressed to the same God. Therefore, it makes no difference which version of the Bible or what form of prayer is used in the public schools.

Fact: No controversy in human history has caused more persecution, oppression, and bloodshed than the question of what is the true word of God and which is the correct way to worship Him or Her. The victims of the Inquisition were persons who revered the same Bible and worshipped the same God as the Inquisitors; they suffered only because they worshipped in a different way. Unfortunately, it cannot be said that human nature has changed so dramatically in the intervening hundreds of years as to make religious persecution now unthinkable. It might now be less blatant; less brutal; but subtle persecution is persecution nonetheless.

Fiction 3.—If a child has the right to be excused from participating in Bible reading or prayer recitation, there can be no valid objection to the practice.

Fact: This is the delusion of "voluntariness". It is belied by history and recognized as a fiction by countless educators and other

persons who know how children think and act. There is nothing voluntary about compulsory school attendance laws.

Fiction 4. The Supreme Court has forbidden the mention of God, or the Bible or religion in the public schools.

Fact: The most effective way of disproving this fiction is to look at the Supreme Court's decisions and see what the Court itself has said. I simply refer to the Committees' attention relevant sections of the Engel and Schempp-Murray cases.

In the Engel decision the Court's opinion states:

There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance.

In the Schempp-Murray case, the Court said:

It is insisted that unless these religious exercises are permitted a "religion of secularism" is established in the schools. We agree of course that the State may not establish a "religion of secularism" in the sense of affirmatively opposing or showing hostility to religion, thus preferring those who believe in no religion over those who do believe. "Zorach v. Clauson, supra, at 314. We do not agree, however, that this decision in any sense has that effect. In addition, it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistent with the First Amendment. But the exercises here do not fall into those categories. They are religious exercises required by the States in violation of the command of the First Amendment that the Government maintain strict neutrality, neither aiding nor opposing religion.

The First Amendment is based on the premise that the separation of church and state is the best for the church and best for the state and secures freedom for both. For two centuries this assumption has proved valid. Religion today enjoys in the United States the highest

degree of esteem, reverence, and influence anywhere in the world. It was the First Amendment which brought this about.

The author of that Amendment, James Madison, placed himself firmly in opposition to any impairment of its basic principles, no matter how slight, "because," he said, "it is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of the noblest characteristics of the late Revolution."

Retaining this "prudent jealousy," the American people have treated the Bill of Rights as unamendable. They have viewed it as a declaration of fundamental principles of government that must remain inviolate if our country is to remain free.

By rejecting the proposed amendments that are the subject of this hearing, this Committee will protect from challenge the basic liberties that promise freedom to all Americans.

PARTICIPATING ORGANIZATIONS:

American Association of School Administrators
 • American Civil Liberties Union • ACLU
 National Capital Area • ACLU of Connecticut
 • Minnesota Civil Liberties Union • American
 Ethical Union • American Humanist Association
 • American Jewish Congress • Americans
 United for Separation of Church and State
 • Anti-Defamation League of B'nai B'rith
 • Baptist Joint Committee on Public Affairs
 • Board of Church and Society of the United
 Methodist Church • Central Conference of
 American Rabbis • Illinois PEARL • Missouri
 Baptist Christian Life Commission • Missouri
 PEARL • New York PEARL • Monroe County,
 New York PEARL • Nassau-Suffolk PEARL
 • Michigan Council Against Parochialism • National
 Association of Lairy • National Council of
 Jewish Women • National Education Association
 • National Women's Conference, American
 Ethical Union • Preserve Our Public Schools
 • Public Funds for Public Schools of New Jersey
 • New York State United Teachers • Ohio Free
 Schools Association • Union of American
 Hebrew Congregations • Unitarian Universalist
 Association

Mr. McCLELLAN. If our next panel could come forward, Hon. James Corman, Mr. George Bushnell, Hon. John Buchanan, and Dr. George Ogle.

Because of the time factor, I shall again have to impose the 6-minute time limitation, again with the understanding that if you have a written statement, it will be placed in the record in full.

Mr. Corman, would you begin first, please?

STATEMENTS OF HON. JAMES CORMAN, REPRESENTING AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, SILVER SPRING, MD.; GEORGE E. BUSHNELL, REPRESENTING THE GENERAL ASSEMBLY OF THE UNITED PRESBYTERIAN CHURCH, NEW YORK, N.Y.; HON. JOHN BUCHANAN, REPRESENTING PEOPLE FOR THE AMERICAN WAY, WASHINGTON, D.C.; GEORGE OGLE, PROGRAM DIRECTOR, GENERAL BOARD OF CHURCH AND SOCIETY, THE UNITED METHODIST CHURCH, WASHINGTON, D.C.

Mr. CORMAN. Thank you, Mr. McClellan, and I will summarize my statement and try not to use the 6 minutes.

I am James Corman, attorney with the firm of Manatt, Phelps, Rothenberg & Tunney in Washington, D.C., and am a former Member of the House of Representatives from California. However, as a member of the board of Americans United for Separation of Church and State, I am representing that organization in their opposition to Senate Joint Resolution 199.

Americans United is a 35-year-old organization dedicated solely to the preservation of the religious liberty and church-state separation provisions of the first amendment of the Constitution. We represent through our membership individuals of conservative and liberal political persuasions as well as the full spectrum of religious faiths and nonbelievers who are concerned with the preservation of religious freedom.

The diversity in Americans United's own membership symbolizes the diversity of religious beliefs in this country, which is one of this nation's greatest strengths and most precious freedoms.

We believe that religious liberty and true freedom of religious expression would be greatly weakened by the amendment.

By introducing this amendment the administration reopened a 20-year-old controversy that began with the 1962 Supreme Court decision of *Engel v. Vitale*.

The intent of the Administration to overturn *Engel v. Vitale* and subsequent Supreme Court decisions is evidenced by a question-and-answer form distributed at the White House on the day the President announced his intention to file the amendment.

The following question and answer was included:

Question. Will State governments or local school boards be free to compose their own prayers if this amendment is ratified?

Answer. Yes. States and communities would be free to select prayers of their own choosing. They could choose prayers that have already been written, or they could compose their own prayers.

Mr. CORMAN. It is important to reiterate here what others have said repeatedly: no child has ever been prohibited from praying in public schools. This no court or Government agency could ever or would ever attempt to do.

It was my rare privilege to have had Chief Justice Warren as a personal friend. He once told me that he thought the decision was best highlighted by two youngsters in a Herblock cartoon, walking to school. One says to the other: "I pray before an exam. I don't care what Earl Warren says."

Who would decide what kind of prayer would be recited during the class day? School administrators, teachers, school boards would be the most likely—perhaps State boards of education would decide what prayers to be given.

One argument proponents of this legislation give for passage of this amendment is that the Supreme Court decisions of 1962 and 1963 caused the country and the public schools to slide into moral decay. Drug abuse, crime and juvenile delinquency, among other evils, are the direct results of removing prayer from schools. That's absurd. Did all of our religious institutions collapse when the Court restated what the law had been for nearly two centuries?

These State-sponsored religious activities are improper because, for many Americans, communication with one's god is a very personal experience and one that should not be trivialized into a disciplinary action, such as quieting a classroom or creating a serious tone or giving a rote prayer. A child's own religious beliefs would never be protected if his own beliefs were contrary to that of the norm in the community.

In addition, no one knows whether the religious exercise would be limited to prayer as a result of this amendment. School authorities might soon decide that prayer is meaningless without further religious instruction. They would be correct. But religious instruction and indoctrination is not the business of the government of a free people.

There is an ancillary problem that was raised in the House when we looked carefully at a similar proposal in 1964, and that was whether the advocates of the amendment wanted to create a right in each American to attend a school where religious prayer was a part of it, or did they merely want to remove the Federal constitutional prohibition, because the State of California, and a good many other States, have specific prohibitions against such conduct. And it seemed at the conclusion of our hearings that they were uncertain about that, but it is something that should be addressed if one is serious in going on with the proposal, the impact on States and their right to prohibit such conduct.

I thank you for listening to me.

Mr. McClellan Thank you, Mr. Corman. Mr. Bushnell?

Mr. BUSHNELL. Chief Counsel, my name is George E. Bushnell, Jr. I am an attorney in private practice in Detroit, Mich., and a ruling elder of the United Presbyterian Church in the United States of America. I appear today at the request of William P. Thompson, stated clerk of the general assembly of that church, to represent the opposition of the general assembly to the proposed constitutional amendment to authorize prayer in public schools. This is a matter of fundamental importance to Presbyterians, and Mr. Thompson would have been with you were his presence not required in Ottawa, where he is an official delegate at the general council of the World Alliance of Reformed Churches.

By way of background, the United Presbyterian Church is the largest of the American denominations that continue in the Calvinist theological tradition and that are governed by interconnected representative bodies composed of both clergy and laity ordained to exercise governance in the church. It presently contains some 2½ million members in 8,997 congregations, organized into 151 presbyteries and 15 regional synods. The denominational governing body, the general assembly, convenes annually and is composed of over 600 ordained elected representatives, half clergy and half laity. Its judgments on public issues form the most authoritative body of church moral teaching, though such authority in our polity is explicitly described as declarative and not mandatory.

Mr. McClellan, the testimony that has been filed with the committee traces in some detail the Presbyterian Church's concern with the issue confronting this committee dating back to the 16th century. I shall not burden this record this morning with even a precise of that testimony, but I do want to share with you the most recent action of our general assembly, which was taken in June of this year in Hartford, Conn. Parenthetically, I might note, our church has been represented in the several hearings that Congress has had on this issue which seems to reappear at an almost cyclical rate, and I specifically commend you and your staff to the three volumes of testimony in the 1964 hearings before the House, to which Mr. Corman has alluded, and I trust you will examine them carefully in making your recommendation to the committee.

But so far as the action of the general assembly most recently is concerned, it can best be paraphrased as follows:

First, religion does not need and should not have the sponsorship of government. Prayer is too important to believers to be routinized, reduced to mumbled incoherence as a political talisman, and trivialized to bland pan-religious conformity.

Second, attempts to promote religion through Government sponsorship, such as the amendment currently proposed, inevitably generate social and religious conflict. History is replete with bloody confirmation of the disastrous effort to compel faith or the observance of faith by civil fiat. Much of the world even today is sick with the fever generated when religion wields the power of government or contends for its favor and patronage. Should Congress send such a proposed amendment to the States, 50 legislatures will become religious combat zones. Should such an amendment by some chance be ratified, the conflict will continue in every American community as well as in the courts. The fruit of your labor will not be civil morality but will be unceasing civil strife.

Third, the attempt to describe the issue as voluntary prayer is, in our judgment, misleading. Any person can now pray in public school, as has been pointed out over and over and again this morning, so long as that prayer is not coercive to others or disruptive of the school's life. The intent of the amendment is to provide officially sanctioned public prayer as part of the program of the school. To suggest that those who find state-sponsored religion meaningless, trivial, or offensive may ask to be excused is to ignore reality. We are guaranteed freedom from state-established religion, not the right to absent ourselves from its services. That guarantee should be kept intact and unambiguous.

I see that my time is coming to an end, and rather than use the entire 5 minutes, I respectfully suggest that, given the colloquy this morning, it is most appropriate to conclude these remarks with a quotation from the sixth chapter of Matthew. You, of course, will recall that Our Saviour was delivering the Sermon on the Mount, when he said, as an introduction to the Lord's Prayer:

And when you pray you are not to be as the hypocrites, for they love to stand and pray in the synagogue and on the street corners in order to be seen by men. Truly, I say to you they have their reward in full.

But you, when you pray, go into your inner room, and when you have shut your door, pray to your Father, who is in secret, and your Father, who sees in secret, will repay you.

Thank you, Mr. McClellan.

Mr. McCLELLAN. Thank you, Mr. Bushnell. Mr. Buchanan?

Mr. BUCHANAN. Thank you. I am John Buchanan. I am here today on behalf of People for the American Way, a nonprofit, non-partisan, educational project formed in the fall of 1980 to protect and promote Americans' constitutional freedoms, especially those contained in the first amendment. We are opposed to this amendment, but it does remind us, again, of the rich diversity of religious faiths in the United States and of our founders' wisdom in drafting the first amendment so well, that so well protects our rich diversity.

Now, lest I forget, I would like to ask that there be included in the record a discussion paper written by People for the American Way by Rev. M. William Howard on the subject, and a special report of People for, and a few newspaper articles that are attached to the back of my statement.

Mr. McCLELLAN. That will be placed in the record.

Mr. BUCHANAN. I am intrigued to note that my Presbyterian friend closed with a quote that is also in my speech. I don't know whether he stole it or it's just that great minds run in the same track, but I'm pleased with the association.

Jesus did, indeed, urge his followers to pray in secret.

And I think there is a great misunderstanding of what prayer is that I have heard in the course of conversation this morning and previously. This amendment, most of us believe, is unnecessary. We do not believe that the present situation interferes with the free exercise of religious faith. But what are the things that the amendments does do?

It will amend the Bill of Rights. It will put the Government squarely between parents and children. It will strip children of the religious freedom they now enjoy—Mormon children in New York City or Protestant children in Baltimore or Jewish children in Dallas or non-Mormon children in Salt Lake City will have their personal religious beliefs contradicted at worst and trivialized at best. It will provoke endless legal turmoil. It will virtually eliminate spontaneous, voluntary prayer and we will have instead prayer sessions led by taxpayer-supported Government employees and teachers. It will mean that prayers will be selected from specific religious denominations or be written by Federal, State, and local official prayer-writing bureaucracies, as in Alabama we have a suggested prayer written into law most recently that is now being challenged in court.

I believe in prayer, but I also recognize that there are others who do not. And the Constitution exists both to protect my right to prayer and to protect those others who do not wish to engage in prayer. It has not been very long since Baptist ministers in the colony of Virginia were beaten, imprisoned, and run out of town for preaching doctrine at variance with the established church, and practicing dissent. The first amendment has served us well in protection against such eventualities.

The task of sustaining America's religious spirit is deeply individual and essentially private. It cannot be nurtured by Government edict, Government preparation of prayers, or by Government intervention in the religious lives of children.

I was intrigued to listen to remarks concerning Thomas Jefferson, because I think the purest definition of the separation of church and state can be found in his statute which he drafted for the State of Virginia, which was one of his proudest achievements, which protected religious freedom in that State. And, as you are aware, every State has followed the example of the Bill of Rights in enacting a religious liberty provision.

So the committee here, and the Congress, should it pass the amendment, will be overruling not only what the Founding Fathers did but what each State has done in this area.

Thomas Jefferson's statute, which he added to the Virginia law, stated that "no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burdened in his body or goods * * * or otherwise suffer * * * on account of his religious opinions or belief."

As a religious person, I am also troubled by the implications of the school prayer amendment because I fear it will trivialize prayer.

Two weeks ago some 150 religious leaders gathered in a nearby Lutheran church to celebrate our Nation's heritage of religious freedom and prayer. People prayed in English, in Hebrew, in Pali, in Piscataway, and in Islamic. In a unified voice, their prayers said there is no one way to pray.

Mr. Chairman, I pray we never return to the world of pre-1962, because in that world, in my State of Alabama and the State of North Carolina and in the United States, the constitutional rights of American citizens were consistently violated by State law and local ordinance. Until the Court acted in the late fifties and the Congress in the middle sixties, the most precious rights of American citizens were systematically violated by States like mine.

In a lesser way, as I grew up in public school in Alabama, I had imposed upon me devotionals that didn't do me much harm because they were just like what I heard in Baptist Sunday school, but they were devotionals that were so "Baptistic" or "Methodistic" in their doctrine, that were imposed, the devotionals, the prayers, on public school children in my State, that I fear we did violate the first amendment rights of some of my neighbors who were Jews or who had some other faith. And I hope we do not see fit to return to that day by the passage of this amendment.

We feel that religious instruction is the province of the church and of the home and not the province of the Government. It is the

province of the courts and of the Congress to protect the rights of American citizens, and you can do so best by failing to report and failing to pass this amendment.

Thank you.

Mr. McCLELLAN. Thank you, Mr. Buchanan. Dr. Ogle?

Dr. OGLE. Yes. I am a program director with the general board of church and society of the United Methodist Church. I am reading a statement on behalf of our general secretary, Dr. Haviland Houston, who could not be here today. Our testimony is brief.

Every 4 years, representatives from United Methodist churches all over the United States meet in general conference to conduct business and discuss issues of social importance. About 1,000 delegates, representing about 10 million United Methodists from the South, North, East, and West, make up this general conference. The general conference is the highest policymaking body of the United Methodist Church, and I wish to share with you, and for the record, a position statement taken by that body in 1980, and I quote:

The constitutional provisions which preclude governments from taking any action "respecting an establishment of religion" has a positive effect on the maintenance of religious liberty. "Establishment of religion" places the power of all of society behind the religious expressions of some part of society. The United Methodist Church is opposed to all establishment of religion by government. Therefore, we are in agreement with the Supreme Court's decisions declaring unconstitutional required worship service as part of the public school program. We believe these decisions enhance and strengthen religious liberty within the pluralism that characterizes the United States of America.

We are opposed to any attempts by Congress to take away from the Supreme Court's jurisdiction decisions with respect to school prayer or any other matter that might threaten constitutional proscriptions against "the establishment of religion."

We recognize that religious liberty includes the freedom of an individual to be an agnostic, a non-theist, an atheist, or even an anti-theist. Otherwise, the civil community would be invested with authority to establish orthodoxy in matters of belief. We are confident that such a state of affairs would constitute a threat to all religious interests. According to the ethical concept of a responsible society, government commits a morally indefensible act when it imposes upon its people—by force, fear, or other means—the profession or reputation of any belief. Theologically speaking, religious liberty is the freedom that God has given, in His creative act, to all persons to think and to choose belief in God for themselves, including the freedom to doubt and deny God.

Now, let me make four observations that will summarize what has just been said.

First. The first amendment guarantees of religious liberty are clear, and in the particular issue of prescribing prayer for use in schools, we believe the Supreme Court's decisions of 1962 and 1982 protect the religious liberty of all our citizens. Therefore, any further amendment is unnecessary.

Second. The wording of this proposed amendment is obscure and imprecise. Who is going to interpret it? If the intent is to leave the interpretation to the States, then there will be 50 interpretations of the Constitution. That is not acceptable. This proposed amendment obfuscates and confuses the church-state relationship and therefore should not be accepted.

Third. Ours is a democratic society built on various pluralisms. One of these is religious pluralism. In our society, we all commit ourselves to protect and respect the right of all others to believe and practice as God gives us light. Religious liberty is not a matter of majority rule, nor of majority vote. It is a covenant among us all as citizens for mutual religious respect. Therefore, in a democratic and pluralistic society such as ours, citizens should not be asked to vote for an amendment that would, in effect, show official preference to one form of religious expression.

Fourth. Finally, let us be clear as to the role of the state in the church-state relationship. The role of the state is to establish justice in the land, not set religious ritual. The responsibility of government is to establish those policies and laws which will protect the weak, provide homes for the homeless, jobs for the jobless, and to see that justice is administered fairly and equally to all our citizens. These are the responsibilities of the state, and by carrying out these responsibilities does the state obey and glorify God. To do justice is the role of the state. It is not the responsibility, nor the right, of government to prescribe religious rituals. Therefore, this proposed amendment to the Constitution of the United States is not acceptable.

In conclusion, a statement from the "Social Principles of the United Methodist Church": "The state should not use its authority to inculcate particular religious beliefs (including atheism) nor should it require prayer or worship in the public schools."

Mr. McCLELLAN. Thank you, Dr. Ogle. I regret that our time has run out.

I do have one quick question I would like to ask Mr. Bushnell and also Dr. Ogle.

Mr. Bushnell, you mentioned that your organization represents 2½ million Presbyterians, is that correct?

Mr. BUSHNELL. Yes.

Mr. McCLELLAN. Has each and every member been polled on whether they favor or oppose this amendment?

Mr. BUSHNELL. Of course not, Mr. McClellan. We are a representative church, and we have elected representatives. Our general assembly corresponds accurately to the Congress of the United States, as your committee represents their constituency by virtue of election, so do our commissioners to the general assembly.

Mr. McCLELLAN. Dr. Ogle, have the United Methodist members been polled?

Dr. OGLE. My response is an amen to what the brother said. Our general conference speaks for our approximately 10 million members over the United States in all parts of the United States.

Mr. McCLELLAN. Are they elected?

Dr. OGLE. Yes, sir, they are elected once every 4 years.

Mr. McCLELLAN. Do you intend to poll the members of the Presbyterian Church or the—

Mr. BUSHNELL. No more than this committee intends to poll the citizens of this country on this preposterous proposed amendment.

Dr. OGLE. Exactly.

Mr. McCLELLAN. We thank you for coming. We appreciate your testimony.

[The prepared statements and submissions of Messrs. Corman, Bushnell, and Buchanan follow:]

PREPARED STATEMENT OF JAMES C. CORMAN

Mr. Chairman and Members of the Committee:

My name is James C. Corman. I am an attorney for the firm Manatt, Phelps, Rothenberg & Tunney in Washington, D.C. and am a former member of the House of Representatives from California. However, as a member of the board of Americans United for Separation of Church and State, I am representing the organization in their opposition to S. J. Res. 199.

Americans United is a 35 year-old organization dedicated solely to the preservation of the religious liberty and church-state separation provisions of the First Amendment of the Constitution. We represent through our membership individuals of conservative and liberal political persuasions as well as the full spectrum of religious faiths and nonbelievers who are concerned with the preservation of religious freedom. Many of our members who are of various religious faiths have strong convictions about prayer, but are concerned with the government's involvement in this strictly religious issue.

It is this unique ability to appeal to people of such diverse political and religious backgrounds and beliefs which especially qualifies this organization to testify on such a controversial issue as prayer in public schools.

The diversity in Americans United's own membership symbolizes the diversity of religious beliefs in this country, which is one of this nation's greatest strengths.

However, we believe that religious liberty and true freedom of religious expression would be greatly weakened by this amendment.

By introducing this amendment the Administration reopened a 20 year-old controversy that began with the 1962 Supreme Court decision Engel v. Vitale, 370 U.S. 421 (1962). In that case the Supreme Court ruled that it was unconstitutional for the New York Board of Regents to compose and prescribe a

prayer which children in New York public schools were forced to recite every morning.

In the following year the Court said in the cases of Abington School District v. Schempp and Murray v. Curlett 374 U.S. 203 (1963) that a state may not require the Bible and the Lord's Prayer to be recited in public schools as part of the daily devotional exercise.

On August 5, 1981 the Supreme Court struck down a Louisiana statute and Jefferson Parish regulation in Karen B. v. Treen No. 81-1031 permitting student and teacher prayers in public schools.

In that same year the Court did not allow students at Guilderland High School to gather in groups before the start of the school day to conduct a communal prayer. The Court held that school supervision inevitably led to an impermissible degree of entanglement between the school and the religious group. (Brandon v. Board of Education of Guilderland 635 F 2d 971 (2d cir. 1980) cert denied, 102S.Ct. pg. 970 (1981).

Then intent of this Administration to overturn those Supreme Court decisions is evidenced by a Question and Answer form distributed at the White House on the day the President announced his intention to file the Amendment.

The following question and answer was included:

- Q. Will state governments or local school boards be free to compose their own prayers if this amendment is ratified?
- A. Yes...states and communities would be free to select prayers of their own choosing. They could choose prayers that have already been written, or they could compose their own prayers.

Some proponents claim that this amendment would help get government out of our lives. On the contrary, it would merely shift the intruding government from the federal to the state and local levels.

Furthermore, it could add an element of sectarian divisiveness to school board elections. Candidates might run for school

board on a platform based solely on the kind of prayer they would favor in the schools.

It is important to reiterate here what others have said repeatedly that no child has ever been prohibited from praying in public schools. This no court or government agency could ever do.

But there is nothing voluntary about a school day routine. Any child would soon recognize that a prayer is not voluntary if it is prescribed by school administrators. It would be a special child who could withstand the disapprobation and pressure from his or her peers and leave the classroom to avoid the morning prayers. Children know when they need to pray. They do not need a prescribed time set aside by the state. And if they lack a religious education, it is not up to the state to take on that responsibility.

Furthermore, there would be few teachers who would have the expertise to lead prayer or religious exercises. And who would decide what kind of prayer should be recited during the class day? School administrators, teachers or school boards would be the most likely choice, or perhaps state boards of education might even claim the right to choose the prayer. What authority and expertise would they have in religion to decide such important and personal matters?

What this legislation would do is permit a kind of watered down, homogenized and bureaucratized prayer that would become routine and meaningless to sincerely religious people. It would have no resemblance to genuine prayer.

One argument proponents of this legislation give for passage of this amendment is that the Supreme Court decisions of 1962 and 1963 caused the country and the public schools to slide into moral decay. Drug abuse, crime and juvenile delinquency, among other evils, are the direct results of removing prayer from schools, they say.

We wish the cause of those problems was that simple.

The problems of this nation are quite complex and stem from a number of factors. The answers to these problems are likely to be complex too. The recitation of a prescribed prayer in classrooms is not a corrective.

Passage of this bill would seriously harm religion and erode the current interfaith harmony that no other country in the world enjoys to the degree that we in the United States experience.

The public schools have a great deal of influence over our children. They influence not only their educational growth, but also their physical and emotional development as well. Therefore, to put government into the business of looking after our children's spiritual well being would be a grave error. Government has no business involving itself in religion because it has no expertise in this area.

Furthermore, these state sponsored religious activities are unneeded because communication with one's God is a very personal experience and one that should not be trivialized into a disciplinary action, such as quieting a classroom or creating a serious tone.

Moreover, it is unclear whether a child's own religious beliefs would even be protected so that he would not be forced to pray in a religious tradition other than his own. The import of a Constitutional amendment may be unknown for years until some cases are challenged in the courts.

Next month in Oklahoma City, for example, a federal court will hear a case involving two parents and their children in Little Axe, Oklahoma. They objected, as practicing Christians, themselves, to the weekly religious ceremony and instruction in their local junior high school. When one of the parents, Mrs. Joann Bird, made known her objections to the school teaching religion to her children during the school day, she was assaulted in the school parking lot. Then her home

was mysteriously burned to the ground. She was forced to remove her children from the school.

In another case recently settled out of court, a Catholic family in Adair County, Oklahoma was forced to remove their two children from public schools to avoid religious indoctrination provided by local fundamentalist volunteers. In both instances we have examples of religious coercion which are direct results of a so-called voluntary prayer law passed by the Oklahoma legislature in 1977.

In addition no one knows whether the religious exercises would be limited to prayer as a result of this amendment. Prayer could be expanded into religious education programs taught on school property.

Beyond that it is unfair for a teacher to be forced to lead a prayer or religious exercise in which he or she may not believe. While the teacher could be excused from participating in the activity by allowing a student to lead a prayer, this could be disruptive and divisive in a classroom where rival religious groups may vie for leadership and control. The best solution is to leave religion out of the classroom entirely as a devotional exercise.

Let no one think, however, that religion is totally divorced from the school experience. There are many ways in which schools can constitutionally deal with religion. Among them are the following:

1. Schools may use the Bible or other religious books as source books in teaching about religion.
2. School may offer a course in the Bible as literature and history.
3. Schools may offer objective instruction in comparative religion.
4. Students may study the history of religion and its role in the story of civilization.
5. Students are free to recite such documents as the Declaration of Independence which contain reference to God.
6. Students may sing the national anthem and other patriotic

songs which contain reference and assertions of faith in God.

7. References to faith in God in connection with patriotic or ceremonial occasions are permissible.
8. Students may be dismissed for sectarian instruction off school premises.
9. School facilities may be rented during off-hours to religious groups if there is a general policy of renting the facilities to nonschool organizations.

The Encyclopedia of American Religion lists 2,000 religious groups in the United States. How could any school board be expected to accomodate the religious diversity found in most school districts in this country? It would be an administrative nightmare.

Government's role toward religion has been and should continue to be one of neutrality. It should neither oppose nor support one religion over others or favor nonreligion. It has no expertise in religion and should leave the teaching of theology and the practice of it to parents and theologians.

As President John F. Kennedy reminded us 20 years ago, the practice of prayer and religious devotions is best suited to the home, and to the church or synagogue. The challenge of education is to teach and to prepare our children for secular subjects and prepare them for productive adult years. One of the challenges of parents is to educate their children in a religious belief and prepare them for the moral and spiritual tests they will encounter in their adult years. While public schools should not ignore the dimensions of morality in education, the basis of it should come from the home, not teachers, administrators or school boards.

And most certainly religion, one of the most private and personal dimensions of a child's education, should not be left the chance instruction of a teacher in a public school. The basis of it should come from the home, church or synagogue.

For these reasons we ask the Committee to reject

S. J. Res. 199.

PREPARED STATEMENT OF GEORGE BUSHNELL

My name is George Bushnell. I am a lawyer in private practice in Detroit, Michigan and a Ruling Elder of the United Presbyterian Church in the United States of America. I appear today at the request of William P. Thompson, Stated Clerk of the General Assembly of that church to represent the opposition of the General Assembly to the proposed constitutional amendment to authorize prayer in public schools. This is a matter of fundamental importance to Presbyterians, and Mr. Thompson would have been with you personally were his presence not required in Ottawa, Canada where he is an official delegate at the General Council of the World Alliance of Reformed Churches. Though I am not a specialist in any of the three disciplines that intersect in the consideration of this proposal - constitutional law, religion, and public education - I have more than passing interest and engagement with each. In thirty years of legal practice, my respect and admiration for the wisdom and utility of the Bill of Rights has steadily deepened as our society has matured and tested both its covenants of freedom and its pluralism again and again. Since 1960, I have maintained some expertise in Michigan law related to public schools, and have represented several school districts including that of the City of Detroit. My commitment to religious faith has had and continues to have great personal meaning to me, but it has also led me to an unusual degree of service in the church's corporate and institutional life, including most recently nine years of service as a member of the Board of the Program Agency of my denomination and four years as its President. I want you to know that I utter my own deep AMEN to this statement of denominational views. I believe that the integrity of three institutions that I care a great deal about is at stake in the matter you consider: the integrity of a vital Bill of Rights, the integrity of authentic religious faith, and the integrity of a genuinely public school system.

The United Presbyterian Church is the largest of the American denominations that continue in the Calvinist theological tradition and are governed by interconnected representative bodies composed of both clergy and laity ordained to exercise governance in the church. It presently contains some 2 1/2 million members in 8,997 congregations, organized into 151 presbyteries and 15 regional synods. The denominational governing body, the General Assembly, convenes annually and is composed of over 600 ordained elected representatives, half clergy and half laity. Its judgments on public issues form the most authoritative

body of church moral teaching, though such authority in our polity is explicitly described as declarative and not mandatory. Before referring to recent actions that bear directly on the subject of prayer in the public schools, however, I want briefly to describe the historic context out of which our current commitment naturally arises:

Calvinists and Presbyterians have been vitally intertwined with the religious and social history of America from its earliest days, spurred by the theology of the Reformer of Geneva who asserted that politics, the governance of the civil community, was the highest vocation to which Christians could aspire. Given the volatile political and social setting of 16th and 17th Century Europe and the task of forging new concepts of church-state relations to succeed the "holy roman empire" concept of "Christendom," it is not surprising that tensions emerged as Calvinism spread to Scotland, England, and Holland from its French and Swiss beginnings. These tensions were reflected in America, particularly after the Calvinist Puritan victory in the English Civil War of the late 1640's.

Thus, the New England Puritans who were Calvinist in theology though congregationalist in governance were drawn toward "establishing" the new Protestant faith as an official religion and were not long on tolerance. The arrival in 1631 of radical Calvinist Roger Williams dramatized the polar potentialities of Calvinist thought and practice in church-state relations. After four years of struggle with John Winthrop and John Cotton, Williams was summarily banned to Rhode Island in 1635 and began his remarkable experiment in religious toleration. (He didn't get his royal charter until 28 years later). Our Presbyterian convictions historically owe much more to Williams (officially a Baptist, though Perry Miller writes that he "remained to the end a stalwart Calvinist, believing firmly in predestination, reprobation, irresistible grace, and above all, in perseverance of the saints") than to the more powerful ruling Calvinists of Massachusetts and Connecticut whose "establishments" all withered away in America's first half-century.

Roger Williams' passionate commitment to religious toleration was grounded in a concern for the peace of society, the authenticity of religion and the integrity of government. He expressed this in three propositions. First, "National religions", as he called them, lead to religious strife and persecution. A pluralistic system where every religious group has a fair and open chance to hear and be heard will better guarantee civil peace. Second, authentic religious expression and practice must come from the heart

and may neither be coerced or contained by the state (a very strong emphasis in Calvin). The state should honor this reality, acknowledging that the power of the "spirit" transcends the power of the "sword". Third, the state's proper concern is to regulate by force of law ("the sword") the gross forms of material and physical harm, faith-breaking, and misrepresentation and disrespect of rights that make cooperative social life impossible. These "natural law commitments" are held in common by all and are therefore the proper responsibility of the government agreed to by all. Both government and religion are corrupted when civil power mimics the forms of faith, since civil power cannot compel the substance of faith.

Many now try to tell us that without some "official religious foundation" there is no secure basis for morality and virtue in public life. Roger Williams rejected that argument over 300 years ago:

There is a moral virtue, a moral fidelity, ability and honesty, which other men (beside church-members) are, by good nature and education, by good laws and good examples nourished and trained up in, that civil places need not be monopolized into the hands of church-members (who sometimes are not fitted for them, and all others deprived of their natural and civil rights and liberties."

The United Presbyterian Church has echoed that sentiment in the Congress before, as I now vigorously reaffirm it today. In 1964, in testimony before the Committee on the Judiciary of the House of Representatives regarding an earlier proposal for a school prayer amendment, the Rev. William A. Morrison, then the General Secretary of the Board of Christian Education of our church, commented on the conviction that such an amendment was needed or would be effective in providing a basis of public morality:

If evidence were available from the years in which Bible reading and the recitation of prayers have been observed in some of the schools of our Nation prior to the recent decisions of the Supreme Court, that moral self-discipline and religious commitment had resulted from these exercises, we might infer that the decisions of the Supreme Court had deprived the Nation of an effective means for the moral and religious instruction not now being provided by home, church or synagogue.....By definition, the civil government or any of its agencies simply cannot accomplish the task of inculcating moral and theological commitment to the God whom thousands of Americans believe is disclosed uniquely in the Holy Bible..... The only God who can be taught within and under the sponsorship of the civil community inevitably turns out to be one of several attractive idols or pseudogods, against whom the whole testimony of Old and New Testament witness must be directed.

As an educator, I am also opposed to prayer and Bible reading in the public schools. Their practice, if constitutionally permissible, would seriously displace a major emphasis of public education away from a task it can perform to one it cannot perform, as I have suggested above. I believe it is possible to develop within the public schools a functional ethic based upon respect for human personality, compassion for one's fellow human beings, a sense of justice, and personal integrity, creative and sensitive teachers, without injecting their own theological dogma into the learning situation, have demonstrated this to be true in the experience of

many of us...I have confidence that such a humane functional ethic as I suggested above in the public schools would be a positive contribution-even a positive faith groups-to the growing maturity of our pluralistic society. [Emphasis added]

The Presbyterian Calvinists of the Middle Colonies and Virginia brought their own vigorous advocacy for religious freedom long before there was an independent nation or a Bill of Rights. In 1707, the Rev. Francis Makemie, Moderator of the first Presbytery established in the colonies, was arrested for preaching without a license in the colony of New York, in which the church of England was established. His eloquent defense before the colonial governor, Lord Cornbury, and his final acquittal by a jury were widely acclaimed as a victory for religious freedom in the colonies and are landmarks in the history of developments that led finally to the First Amendment.

The first church body to recognize the Declaration of Independence was the Presbytery of Hanover in Virginia. This judicatory addressed a memorial on October 24, 1776, to the Virginia Assembly in which the members "rely upon this Declaration....to secure us the free exercise of religion according to the dictates of our consciences." Accordingly, the memorialists noted that "they ask no ecclesiastical establishment for ourselves; neither can we approve of them when granted to others."

It is not, then, a novel thing for Presbyterians to appear before legislatures in defense of religious liberty for themselves and others, as I appear today before you.

Out of such experience and struggle in Colonial America and the years of the Revolutionary War, Presbyterians came together in 1789, two years before the Bill of Rights was incorporated into the United States Constitution, to form the first General Assembly. The following assertion was adopted as the first of the "preliminary principles," part of the essential foundation of faith and order for the new national denomination being formed:

'God alone is Lord of the conscience and hath left it free from the doctrines and commandments of men which are in any thing contrary to His Word, or beside it, in matters of faith and worship.' Therefore, we consider the rights of private judgment, in all matters that respect religion, as universal and unalienable: We do not even wish to see any religious constitution aided by the civil power, further than may be necessary for protection and security, and, at the same time be equal and common to all others.

That statement remains unchanged as part of the Constitution of the United Presbyterian Church today, almost the same age as the equally simply First Amendment to the United States Constitution. They enshrine two facets

of the same hard-won essential truth: A society that cares for civil peace and genuine religion will take great care to protect the precious variety of faith from the power or patronage of the state. That truth, I believe is even more important in 1982 than it was in 1789 or 1791. The percentage of Americans in formal religious membership is far higher now than it was then, and the creeds they profess are far more varied.

This precious principle has been under increasing pressure from some quarters in our society in the last twenty years; that is since the June 25, 1962 decision of the United States Supreme Court in the New York Regents prayer case clarified what should have been obvious: "in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by the Government." Though official school prayers had not, in fact, been widespread in the nation, immediate efforts to amend the Constitution and so nullify the court decision ensued. I have alluded earlier to the 1964 Congressional hearings, published in three volumes, and I hope the members of this committee will review that record as part of their consideration of the current effort to negate almost two hundred years of constitutional history.

When the 1962 decision of the Supreme Court was announced, the United Presbyterian Church was mid-way in an extended review of its policy regarding relations between church and state. The review was conducted by a Special Committee, authorized and instructed by the General Assembly in May, 1960. In May of 1962 (before the Engel vs. Vitale decision) the General Assembly considered a preliminary report on the issues, including the questions of prayer and Bible reading in public schools, and referred the report and recommendations to the congregations and presbyteries for study and response prior to final decision in May of 1963. The entire report was studied by 989 congregations and 131 presbyteries, whose votes were tallied on each of ten sections separately. The section on prayer and Bible reading was the most controverted part--hardly surprising in view of the public reaction to the June 1962 decision--but it was approved by vote in over two-thirds of the jurisdictions. The entire report was adopted in May 1963 by the General Assembly (528-298 or 64%) and has stood as basic policy since that time. The relevant section, conveyed to Congress in the 1964 hearings and at other times since, reads:

Because of the conflicts stemming from the pluralistic nature of our society; because of the abuses that have plagued every historic attempt at a theocratic society; because God has given

all persons freedom to choose or reject the redemption offered in Jesus Christ; and because organic entanglement of church and state inevitably deprives persons of the full exercise of that God given freedom;

The General Assembly redeclares its conviction that church and state must be organically separate...and adopts the following guidelines for study and action by all judicatories of our church:

1. The celebration of religious holidays, Bible reading and prayer in public schools.

- f. Religious observances should never be held in a public school or introduced into the public school as part of its program.....Bible reading and prayers as devotional acts tend toward indoctrination or meaningless ritual and should be omitted for both reasons."

I have stressed the context in which this policy was adopted by our denomination. Though this study was started in 1960, the actual "year of decision" coincided almost precisely with the initial severe, often uninformed and intensely emotional reaction to the decision in Engel vs. Vitale. In that climate, the solid and very widespread and public two to one affirmation testifies impressively to the depth and solidity of United Presbyterian commitment: "the government of our country must be neutral on matters of faith, dogma and indoctrination....We Presbyterians wish to live, teach and evangelize within a political order in which no church will dominate the civil authorities or be dominated by them."

Given this history and this policy, it is not surprising that the 194th General Assembly, convened in June of 1982 in Hartford, Conn., should adopt a resolution in specific opposition to the amendment you are now considering. The full text is incorporated as an appendix, but the argument is terse:

1. Religion does not need and should not have the sponsorship of government. Prayer is too important to believers to be routinized, reduced to mumbled incoherence as a political talisman, and trivialized to bland pan-religious conformity.
2. Attempts to promote religion through government sponsorship, such as the amendment currently proposed, inevitably generate social and religious conflict. History is replete with bloody confirmation of the disastrous effort to compel faith or the observance of faith by civil fiat. Much of the world even today is sick with the fever generated when religion wields the power of government or contends for its favor and patronage. Should Congress send such a proposed amendment to the states, fifty legislatures will become religious combat zones, with the terrible examples of Northern Ireland and Lebanon not altogether inconceivable. Should such an amendment by some chance be ratified, the conflict will continue in every American community as well as in the courts. The fruit of your labor will not be civic morality but unceasing civil strife.
3. The attempt to describe the issue as "voluntary" prayer is misleading. Any person can now pray in public school as faith leads them to pray, so long as that prayer is not coercive to others or disruptive of the school's life and function. The intent of the amendment is to provide

officially sanctioned public group prayer as part of the program of the school. To suggest that those who find state-sponsored religion meaningless, trivial or offensive may ask to be excused is like saying that black persons who find state-sponsored discrimination offensive can move to another country., We are guaranteed freedom from state-established religion, not the right to absent ourselves from its services. That guarantee should be kept intact and unambiguous.

In summary, on behalf of the General Assembly of the United Presbyterian Church, I urge you to oppose the so-called prayer amendment. It would seriously erode a fundamental and precious freedom, introduce sectarian controversy into every American community, divert public schools from their proper responsibility, and reduce religious faith and practice to a travesty. It seems very strange, in a time when most Americans are skeptical of the ability of government to accomplish effectively the tasks of welfare, service and justice which are clearly its responsibility, that the Senate is considering assigning to it functions in the infinitely varied and delicate world of religious faith, clearly not within the responsibility of government and, I submit to you, not within its competence. Indeed, if the government were more attentive to and competent in its assigned tasks of welfare, service and justice in our society, we might not hear so many political cries for prayer. The Bible speaks powerfully of those who would substitute religious observance for justice and mercy.

I thank you for this opportunity to communicate the opposition of the General Assembly of the United Presbyterian Church to the proposed constitutional amendment on prayer in public schools and public institutions.

Attachment.

RESOLUTION ON PROPOSED PRAYER AMENDMENT

Adopted on June 28, 1982
Hartford, Connecticut

194th General Assembly (1982) of the United Presbyterian Church

Whereas, the President of the United States has submitted to the Congress a proposal to amend the Constitution of the United States with the following language: "Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any state to participate in prayer."; and

Whereas, the President stated that the amendment was necessary in order to "restore the right to pray," and "to allow our children to pray in school," though this right is secured to individuals under existing law and constitutional interpretation; and

Whereas, the intended effect of the proposed amendment is to permit a return to the situation that prevailed in many states 20 years ago when officially sanctioned prayers were required or sponsored by public schools in classrooms; and

Whereas, columnist James J. Kilpatrick recently wrote: "It is pure sham to contend that in such circumstances 'prayer and meditation' can be made 'voluntary.' Only the boldest children, willing to make themselves conspicuous, will walk out...The best solution is to leave a child's religious instruction where it belongs, in the home, in the church, in the temple, in his mind and heart. And when a child learns what prayer is all about, get him to read Matthew 6:5-8. The passage contains some marvelously sound advice."; and

Whereas, the 175th General Assembly (1963) of the United Presbyterian Church stated that:

"Because of the conflicts stemming from the pluralistic nature of our society; because of the abuses that have plagued every historic attempt at a theocratic society; because God has given all persons freedom to choose or reject the redemption offered in Jesus Christ; and because organic entanglement of church and state inevitably deprives persons of the full exercise of that God-given freedom.....religious observances (should) never be held in a public school or introduced into the public school as part of its program.....Bible reading and prayers as devotional tend toward indoctrination or meaningless ritual and should be omitted for both reasons"; and

Whereas, the National Council of Churches, the Baptist Joint Committee on Public Affairs, the Synagogue Council of America and the Union of American Hebrew Congregation, as well as other religious and societal groups, have expressed their opposition to this attempt to legitimate government-sponsored religious observance.

The 194th General Assembly (1982) of the United Presbyterian Church, convinced that religion does not need and should not have the sponsorship of government, and that attempts to provide such sponsorship will inevitably generate sectarian and interreligious conflict, therefore:

1. Declares its opposition to the proposed constitutional amendment on school prayer;
2. Urges United Presbyterians not to be misled by references to officially sponsored classroom prayer as "voluntary" or by allegation that their children do not now have the right to pray in public schools; and
3. Directs the Stated Clerk to communicate this resolution to the members of Congress.

PREPARED STATEMENT OF JOHN H. BUCHANAN, JR.

Mr. Chairman and Members of the Committee:

My name is John Buchanan and I am here today on behalf of People For The American Way, a nonprofit, nonpartisan, educational project formed in the Fall of 1980 to protect and promote American's constitutional freedoms, especially those contained in the First Amendment. I am pleased to appear today on behalf of PEOPLE FOR to present our views on S. J. Res. 199, the proposed amendment on school prayer.

We are opposed to the amendment, but we welcome the debate prompted by its introduction. I believe that it is healthy for this society to discuss the issues raised by S.J. Res. 199. It reminds us once again of the rich diversity of religious faiths in the United States and of our Founders' wisdom in drafting the First Amendment that so well protects our rich diversity.

At the very outset I think it is very important to discuss exactly what this amendment does and does not do. The amendment's proponents assert that all they are trying to do is turn back the clock to pre-1962 and pre-1963, alluding to the Supreme Court decisions of those years. Many people mistakenly believe that the Supreme Court has outlawed prayer in public schools. It has not. On this very day students can, if they wish, pray either singularly or in groups in public schools or other public buildings without violating the Constitution, subject only to a very few limitations: religious exercises cannot interfere with the school's other activities; the prayer cannot be sponsored by, or appear to be sponsored by, the governing body; and the prayer must be truly voluntary. That is the law now and that is the law that this amendment attempts to change.

Let me now set forth in concrete terms what S.J. Res. 199 will do:

- It will amend the Bill of Rights, which has served us well for almost 200 years.

- It will put the government squarely between parents and children - administrators and some teachers will use it as a mandate to interfere in molding children's most personal religious beliefs - regardless of their parent's wishes.
- It will strip children of the religious freedom they now enjoy. Mormon children in New York city, Protestant children in Baltimore, Jewish children in Dallas, and non-Mormon children in Salt Lake City will have their personal religious beliefs contradicted at worst, and trivialized at best.
- It will provoke endless legal turmoil as lawsuits and countersuits are filed over the definitions of "prayer" and "voluntary". Scarce school funds will be wasted on legal fees.
- It will virtually eliminate spontaneous, voluntary prayer. Prayer sessions will be organized and led by taxpayer-supported government employees and teachers.
- It will mean that prayers will be selected from specific religious denominations - Catholic, Protestant, Jewish, Hindu, the Unification Church of Reverend Moon - or be written by federal, state and local official prayer-writing bureaucracies.

Mr. Chairman, I believe in prayer, but I also recognize that there are others who do not. The Constitution exists both to protect my right to prayer and to protect those others who do not wish to engage in prayer. There were times in the not so distant past when the government tracked down people who believed as I do as a Southern Baptist. It was not too long ago that Baptist ministers were beaten, imprisoned and run out of town in the Colony of Virginia, for example, for preaching doctrine at variance with that of the established church. Government can be benevolent, but government can also be bigoted. Some forces behind this amendment could take us back to the day when one person's religion would be imposed on another.

The proposed school prayer amendment provides a simplistic solution to today's complex problems. The task of sustaining America's religious spirit is deeply individual and essentially private. It cannot be nurtured by government edict, government preparation or prayers, or by government intervention in the religious lives of children. This is what the writers of the First Amendment to the Constitution so wisely

recognized so many years ago. When I became a member of Congress, I took an oath to uphold the Constitution just as you did. I have come to understand the meaning of that sacred trust more fully than I did on that first day. Now I see that nothing must be allowed to violate that trust even if it appears to be a quick solution for all ills.

The First Amendment to the Constitution directs that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." This language represents the delicate balance that is popularly known as the separation of church and state. There is no magic formula to define exactly where this separation occurs. In fact one prominent church historian, Martin Marty, has defined the area as a "zone" of separation that "is itself part of a very fluid tradition.

What church-state separation actually means was best stated, I think, by Thomas Jefferson when he drafted the Virginia statute of religious freedom to protect Baptist ministers from persecution in Virginia. The statute provides, in part:

"that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burdened in his body or goods...or otherwise suffer...on account of his religious opinions or belief."

As a religious person, I am also troubled by the implications of the school prayer amendment. I fear that it will trivialize prayer. Some of you may recall a recent Wall Street Journal editorial (7/22/82)* by a young woman who grew up in South Carolina. She wrote:

"From the first grade through the sixth, my school day routinely included explicitly Christian devotional exercises. For the most part, our devotional lessons were bland, unmemorable homilies that actually trivialized prayer more than they promoted it. Most students considered the daily devotional something of a joke, a sentiment of which I was acutely conscious the many times I was responsible for the lessons myself. Our "Little Visits with God" (a book with that title was a major source of material) failed to make many lasting impressions. On the whole, the readings were innocuous (though possibly offensive to a child who is a non-Christian).

As Dr. Jimmy Allen, former President of the Southern Baptist

Convention, said: "We are not against prayer, but against forced religious rituals." Prayer is a private matter. Jesus himself said in Matthew 6:5-6:

...[W]hen thou prayest, thou shalt not be as the hypocrites are: for they love to pray standing in the synagogues and in the corners of the streets, that they may be seen of men. Verily I say unto you, they have their reward. But thou, when thou prayest, enter into thy closet, and when thou hast shut thy door, pray to thy Father which is in secret; and thy Father which seeth in secret shall reward thee openly.

Two weeks ago today some 150 religious leaders gathered in a nearby Lutheran Church to celebrate our nation's heritage of religious freedom and prayer. People prayed in English, in Hebrew, in Pali, in Piscataway and in Islamic. In a unified voice, their prayers said there is no one way to pray. Their prayers made it clear that passage of this amendment to return government sponsored prayer to public schools would interfere with the religious liberty of their minority faiths. For the record I am including some news articles that described this "Celebration of Religious Liberty."

If I were asked to give one example of the pitfalls of the proposed school amendment, I would look to my own state of Alabama. There a state-level school prayer law, which would be allowed by the proposed amendment, is being challenged in federal district court. The facts are these. In July, 1982, Governor Fob James signed into law a bill which states:

....any teacher or professor in any public educational institution within the state of Alabama, recognizing that the Lord God is one, at the beginning of any homeroom or any class, may pray, may lead willing students in prayer, or may lead the willing students in the following prayer to God:

"Almighty God, you alone are our God. We acknowledge you as the Creator and Supreme Judge of the world. May your justice, your truth, and your peace abound this day in the hearts of our countrymen, in the councils of our government, in the sanctity of our homes, and in the classrooms of our schools, in the name of the Lord. Amen."

This "suggested" prayer was written by the Governor's son, Fob James,

III. The law is presently being challenged in court by someone who

finds the prayer in violation of his religious freedom.

Alabama's attempt to legislate government prayer is consistent with the guidelines drawn up by Morton C. Blackwell, Special Assistant to the President for Public Liaison, who transmitted the President's proposed amendment. In the Q&A on the final page of the document the question was asked:

- Q. Will state government or local school boards be free to compose their own prayers if this amendment is ratified?
- A. Yes. Since the voluntary school prayer amendment will eliminate any federal constitutional obstacles to voluntary school prayer, states and communities would be free to select prayers of their own choosing. They could choose prayers that have already been written, or they could compose their own prayers. If groups of people are to be permitted to pray, someone must have the power to determine the content of such prayers.

In this one paragraph, it seems to me, the White House has condemned its own amendment.

School prayer, when required by law, is not voluntary. It is a mandatory religious ritual. Should children with "different" religious convictions leave the room or do something else at prayer time? Few 8-year-olds will defy peer pressure, the teacher's authority, and state law in order to exercise their constitutional rights. They should not be stigmatized or singled out for simply wanting to be true to their religious convictions.

The so-called local option that is contained in the White House statement means that states could impose a single religious belief on students. The Mormon faith could be mandated by law in Utah, Catholicism in Maryland, and Protestantism in Tennessee. Advocates of "voluntary" school prayer assume that the prayer selected will not offend their religious beliefs. But if religious freedom means anything, everyone's religious convictions must be respected. Would fundamentalist Christians consent to a "voluntary" reading from the Koran or the teachings of unconventional religious leaders like the Guru Marahaj Ji? Finally, who will have the power to determine the content of such prayers. Who will decide is precisely the issue.

I am also disturbed by the threat to public education that this amendment represents. In its 1980 Book of Resolutions, the United Methodist Church stated this concern quite eloquently:

"Public schools have often been an important unifying force in modern pluralistic society by providing more contact at an early age between children of vastly different backgrounds. We recognize in particular that persons of all religious backgrounds may have insight into the nature of ultimate reality which will help to enrich a common life. It is therefore essential that the public schools take seriously the religious integrity of each child entrusted to their care. Public schools may not properly establish any preferred form of religion for common exercises of worship, religious observance, or study. At the same time, however, education should provide an opportunity for the examination of the various religious traditions of human kind.

The dangers of tampering with the First Amendment and the protections it provides to all Americans are well illustrated by an amendment pending in the Senate this very week. As I understand it, S. 1742 will be offered as an amendment to the debt ceiling bill. S. 1742 would strip the Supreme Court of its jurisdiction over school prayer cases, and also attacks religious freedom by challenging the First Amendment.

Some supporters of court-stripping bills fail to realize that their actions could also be used against them in the future by a different political majority. Few people know that the right to send children to private religious schools was established in a landmark 1925 Supreme Court decision, Pierce v. Society of Sisters. By overturning an Oregon state law that required public school attendance, the court stood as a sentinel defending family rights and religious liberty.

Mr. Chairman, the religious instruction of children is the responsibility of parents and their churches. It is clearly neither the responsibility nor the constitutional right of government or the public schools. Protecting the constitutional rights of American citizens is the solemn responsibility of the courts and the Congress.

We at People for the American Way prayerfully hope that the Congress will take no action to dilute the First Amendment, so hard won by our Founders, so protective of our sacred rights and so much more important to the welfare of our children and of their children's children than government-sponsored prayers in school could ever be to anyone's child.

Mr. Chairman, we urge that the Committee not report and the Senate not pass S.J. Res. 199.

[From the Texarkana Gazette, July 29, 1982]

RELIGIOUS LEADERS PACK CHURCH TO OPPOSE PRAYERS IN SCHOOL

WASHINGTON.—Some 150 religious leaders opposed to returning prayer to public schools jammed a church basement near the Capitol Wednesday to celebrate the nation's heritage of religious freedom—and to pray.

They prayed in English and non-English tongues and invoked the Bible and the Koran. Their attire included rust-colored robes, ceremonial feathers, clerical collars, neckties, open shirts and dresses.

"We not against prayer, but against forced religious rituals," said Dr. Jimmy Allen, former president of the Southern Baptist Convention, the nation's largest Protestant denomination.

The coffee-and-juice celebration of religious liberty was sponsored by People for the American Way to call attention to the rich diversity of religious faiths in the United States and to underscore the fear that passage of a proposal to return government-sponsored prayer to public schools would interfere with the religious liberty of minority faiths.

The Senate Judiciary Committee plans a hearing today on a constitutional amendment to overturn the Supreme Court's 1962 and 1963 decisions prohibiting mandatory prayer and Bible reading in government-financed schools.

"The First Amendment was not written for the religious majority, but to defend one person who wants to disagree," said the Rev. Charles Bergstrom.

[From Time magazine Aug. 9, 1982]

THE POLITICS OF PRAYER

CLERGY DEBATES THE PRESIDENT'S CONSTITUTIONAL AMENDMENT

The clergy ought to be the last group to argue about prayer. Instead it is among the foremost. Last week religious leaders of many major denominations gathered before the Senate Judiciary Committee to testify loudly for and against President Reagan's proposed constitutional amendment legalizing prayer in the public schools.

Support for the Reagan amendment was the prime topic at a Washington "profamily" strategy session of the religious right. Meanwhile, opponents unveiled a new coalition of 72 organizations at, naturally, a prayer breakfast. Buddhists and American Indians turned out in full regalia, joined by Jew, Muslims and Christians. The group charges that school devotionals create "the very interreligious tensions and conflict that the First Amendment was designed to prevent."

The dispute results from U.S. Supreme Court decisions. In 1962 and 1963 the court said that the Constitution's ban on "establishment of religion" ruled out New York State's recommended nonsectarian prayer and Pennsylvania's Bible readings and Lord's Prayer recitations. Just last January the court threw out a Louisiana law allowing students or teachers to offer their own prayers. Eight months ago, the Justices also refused to review a decision forbidding students to form in-school prayer meetings on their own before classes. Some states allow a "moment of silence" for students to pray if they wish; the Supreme Court has not ruled on that.

The Reagan amendment reads: "Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any state to participate in prayer." The President and proponents like Jerry Falwell of Moral Majority demand the change in the name of religious freedom, the same cry raised by the other side.

The largest U.S. Protestant denomination, the Southern Baptist Convention, is particularly divided. It opposed school prayers until the annual meeting last June, where conservatives engineered a reversal. But Southern Baptist Minister James Dunn, executive director of the Baptist Joint Committee on Public Affairs (and thus Washington spokesman for the Southern Baptists along with other groups) is undeterred: "We're opposed to this theologically, because it trivializes prayer into a civil religion." As Dunn sees it, "Kids trapped in a captive audience by compulsory-attendance laws can hardly be considered to be doing anything voluntarily."

Organizations from all branches of Judasim, the Lutheran Council and old-line Protestants in the National Council of Churches agree. The U.S. Catholic Conference welcomes such legislation but is especially interested in overturning a 1948 Supreme Court decision and restoring voluntary "released time" religion classes on

public school premises. The Greek Orthodox and many Evangelical Protestants also support the amendment.

Though congressional action this year is unlikely, polls show that two-thirds of more of the public favor a school prayer amendment, and advocates are certain that if a proposal ever gets to the floor, few legislators will want to go on record against invoking the Almighty.

[From the Washington Post, July 29, 1982]

About 100 religious leaders met yesterday in the basement of the Lutheran Church of the Reformation at an informal breakfast to demonstrate the diversity in American religious beliefs—in protest of the proposed voluntary school prayer amendment. Hearings before the Senate Judiciary Committee are scheduled for today.

Tony Podesta, executive director of the People of the American Way, the nonprofit organization that coordinated the breakfast, said, "We already have voluntary prayer in the schools. Anybody who wishes to pray can pray whenever they want to. We don't need a bureaucratic commission to choose a homogeneous, national prayer and print it up in the Federal Register."

The breakfast was highlighted by statements and prayer demonstrations by representatives of various religions to show differences in their prayer techniques.

Draped in a saffron robe, Venerable Bhante Gunaratna chanted a Buddhist prayer. Mark Tyac, a Piscataway Indian, donned a multicolor blanket and used his pipe to demonstrate a prayer to the Great Spirit. Khalil Abdel-Alim, an imam, or minister of Al-Islam, said that a standardized prayer in the schools would threaten the freedom of the estimated 5 million Muslims in the United States.

[From the Los Angeles Times, Aug. 14, 1982]

PRAYER ISSUE CROSSES DENOMINATIONAL LINES

(By David Anderson)

The dilemma of the debate over returning state-sponsored prayer to public schools was brought sharply into focus during a Senate Judiciary Committee hearing.

Two Southern Baptist senators were on opposite sides. Former Southern Baptist Convention President Jimmy Allen opposed the amendment; Edward E. McAteer, head of the New Right Religious Roundtable and a fellow Baptist, backed it.

The division is not unique to Southern Baptists—felloes run deep both within and across denominational lines.

The tradition of prayer in the schools—sporadic at best even before the 1962 and 1963 Supreme Court decisions and never institutionalized to the extent some of its supporters suggest—generally met little opposition until the country became aware of its religious and ethnic pluralism.

That pluralism will be threatened and feuding will intensify if prayers return to the classroom, opponents feel.

People for the American Way, which promotes an understanding of the diversity of American life, recently held a breakfast celebration for religious liberty.

To gathering asked:

Will Indian children in Minneapolis recite prayers written by Lutherans or ask to leave the room, further underscoring their difference from the majority? Will Latino Catholics or white Baptists write the prayers in Texas? Jews or Pentacostals in New York?

The Rev. Dean Kelley of the National Council of Churches told the senators considering the prayer issue:

"The founders of this nation created an arrangement in which the civil covenant binding the inhabitants into one nation was to be independent of the religious covenants by which they undertook to serve God according to their several faiths."

The proposed amendment would "abandon the American experiment," Kelley said. "The majority would rule in the religious forms to be instituted in public schools and other public institutions. Members of religious minorities, who are equally citizens and whose taxes equally support those institutions, would no longer be equally at home in them."

[From People of the American Way]

THE CRUSADE AGAINST THE COURTS: AN ATTACK ON OUR CONSTITUTIONAL RIGHTS

Slowly and quietly, a constitutional crisis is brewing in the U.S. Congress. Over the past few months, religious authoritarians and New Right groups have stepped up their attack on the federal courts and individual rights. Their weapon: more than 30 bills that would overturn past Supreme Court decisions and cripple the independent authority of the federal courts. While these "court-stripping" bills are not inciting noisy demonstrations or splashy news coverage, their effects could be far-reaching and profound.

Imagine a new U.S. Constitution without carefully designed "checks and balances" among the different branches of government. And imagine a Bill of Rights that could be selectively abridged. Imagine, finally, that these changes could be achieved through an expedient, backdoor approach—a simple majority vote of Congress—rather than through the constitutional amendment process.

Already, in March 1982, the Senate approved a bill that would ban federal court involvement in cases where busing is used to desegregate public schools. Meanwhile, support is growing for similar bills that would prohibit federal courts from deciding cases involving school prayer and abortion.

These laws, if enacted, would bar citizens from asking federal courts to remedy violations of their rights. Moreover, if past Supreme Court rulings on busing could be overturned in this way, why not decisions on free speech, a free press, or freedom of religion?

ASSAULT ON THE SUPREME COURT

The crusade against the courts is waged by a coalition of religious authoritarians and New Right groups who refuse to accept several Supreme Court decisions of the past 20 years. The most controversial of these are:

The 1962 and 1963 decisions banning mandatory religious devotions in public schools;

The 1973 rulings which established the right of women to choose to end their pregnancies; and

A series of decisions since the late 1960s which require busing to help end segregated public school systems.

The leading opponents of these Supreme Court rulings in the Senate are Jesse Helms and John East of North Carolina, Orrin Hatch of Utah, and J. Bennett Johnston of Louisiana.

By stripping the federal courts of their authority to review these cases, critics expect state courts to render more favorable decisions. But the Conference of Chief Justices, who are under oath to uphold the Constitution and Supreme Court decisions, unanimously condemn the court-stripping strategy as "a hazardous experiment with the vulnerable fabric of the nation's judicial system." The State justices recognize that a "United States" cannot have 50 different interpretations of constitutional rights. "Equal justice under the law" will become a nostalgic memory if residents of Massachusetts have different rights than the residents of Mississippi.

The proper way to challenge Supreme Court decisions, of course, is through a constitutional amendment. Two-thirds of the House and Senate and three-quarters of the state legislatures must approve any amendment. It is a slow, unwieldy process, as backers of the Equal Rights Amendment have learned. But that is what the framers of the Constitution intended. They wanted the process to be cumbersome so that no change could be made in the basic principles of our government or citizens' individual rights without widespread and lasting public support.

LUKEWARM LOYALTY TO THE CONSTITUTION

Moral authoritarians admit that their court-stripping bills are a quick and easy way around the Constitution—an odd confession from people who profess to revere our nation's founding charter.

But then, many critics of the federal judiciary aren't so sure they support the Constitution. New Right leader Paul Weyrich, director of the Committee for the Survival of a Free Congress, told a reporter last year, "The Constitution has been so perverted by the courts, so betrayed by government regulations, it isn't the same Constitution we were talking about 20 years ago. I don't want to defend that kind of Constitution."

Powerful televangelist Pat Robertson also has his doubts about the Constitution. On his nationally broadcast "700 Club" TV show, he praised the Constitution as "a

marvelous document for self-government by Christian people." But, he warned, "the minute you turn the document into the hands of non-Christian people and atheist people, they can use it to destroy the very foundations of our society—and that's what's been happening."

Federal judges, Rev. Robertson asserts, are behind "a deliberate attempt to bring the United States into line with the Constitution, not of the United States, but of the U.S.S.R." A host of other TV preachers, ultrafundamentalists and New Right leaders also routinely attack the federal courts and judges. The recurrent complaint is that "unaccountable" federal judges are on a rampage of "judicial activism."

One of the more lurid assaults came at a "Rally for Life" sponsored by the Religious Roundtable in September 1981. A "Unanimous Declaration" circulated at the rally charged:

"These born-again Ayatollahs of Paganism, enrobed as federal Judges, with unchecked power, in violation of the Constitution, have established their religion of Paganism upon us, imposing its barbarism and corruptions, demanding the modern materialistic gods of consumerism and careerism be sated with children's blood."

AMERICA'S UNIQUE INDEPENDENT JUDICIARY

Living under British rule taught the framers of the Constitution how parliamentary majorities could trample on the rights of individuals. The framers' innovative solution was a separate branch of government—an independent federal judiciary. While the rule of the majority would be ensured through democratic elections to Congress, the rights of individuals would be ensured through the federal courts, which would have final, binding authority to interpret and enforce the Constitution.

Judges were given life tenure so that organized political majorities could not unfairly sway their independent judgment. Their foremost duty is to protect the Constitution and individual rights—not reflect the opinions of the loudest partisan voices.

If enacted, however, court-stripping legislation will radically change the federal courts' historic role. Any disgruntled majority could in effect rewrite the Constitution by eking out a 51 percent vote in Congress and gaining presidential approval. Congress would arrogate to itself a power that belongs to another branch of government.

Is it any wonder that David Brink, president of the 290,000-member American Bar Association, warned that court-stripping bills could lead to "the most serious constitutional crisis since our great Civil War"? Prominent constitutional scholars like Archibald Cox, Robert Bork, and Laurence H. Tribe have condemned the bills. And legislators as different in their political views as Senators Barry Goldwater, Lowell Weicker, Alan Cranston, and Edward Kennedy agree that the court-stripping bills would have serious constitutional repercussions. As Senator Dale Bumpers of Arkansas said of one of the bills, it would make a "dart board" of the Constitution and mark "the beginning of the end of constitutional guarantees in this country." The general counsel of the U.S. Catholic conference has stated that Congress cannot prohibit the courts from interpreting the Constitution on abortion issues.

MANDATORY SCHOOL PRAYER ATTACKS RELIGIOUS FREEDOM

What supporters of court-stripping bills fail to realize is that their politically expedient tactics could easily be used against them in the future by a different partisan majority. Few religious authoritarians, for example, know the right to send their children to private religious schools was established in a landmark 1925 Supreme Court decision, *Pierce v. Society of Sisters*. By overturning an Oregon state law that required public school attendance, the Court stood as a sentinel defending family rights and religious liberty.

Today, the people who directly benefit from this decision want the Supreme Court to deny these rights to other persons. Despite their rhetorical demands that government stop interfering in people's lives, court-strippers *invite* state intrusion into private religious matters by seeking to limit court jurisdiction over school prayer cases. Senator Jesse Helms' "Voluntary School Prayer Act" actually *attacks* traditional religious and family values: it asks the government to interfere with the traditional right of parents to teach their own religious values to their children.

School prayer, when required by law, is *not* voluntary. It is a mandatory religious ritual. Should children with "different" religious convictions leave the room or do something else at prayer time? Few eight-year-olds will defy peer pressure, the teacher's authority, and state law in order to exercise their constitutional rights. Nor should they be stigmatized or singled out for simply wanting to be true to their religious convictions.

Advocates of "voluntary" school prayer assume that the prayer selected will not offend *their* religious beliefs. But if religious freedom means anything, *everyone's* religious convictions must be respected. Would fundamentalist Christians consent to a "voluntary" reading from the Koran or the teachings of unconventional religious leaders like the Guru Marahaj Ji?

Most mainline religious groups recognize the threat to religious freedom posed by the "voluntary" school prayer bill, and therefore support the Supreme Court's 1960's school prayer decisions. The Southern Baptist Convention points out that the "Supreme Court has not held that it is illegal for any individual to pray or read his or her Bible in public schools." Most religious groups realize that if states are free to impose a single religious belief in classrooms, Mormonism could be mandated by law in Utah, Catholicism in Maryland, and Protestantism in Tennessee.

WILL THE CONSTITUTION ENDURE?

The current assault on the Supreme Court and federal courts is not the first effort by politicians to expand their powers at the expense of the Constitution. One of the most famous attempts to tamper with the Supreme Court came when Franklin D. Roosevelt unsuccessfully tried to "pack" the court with his appointees. Fortunately, a Congress dominated by the president's own party rejected his "court-packing" plan.

In rejecting President Roosevelt's plan, the Senate Judiciary Committee declared that "we would rather have an independent Court, a fearless Court, a Court that will dare to announce its honest opinions in what it believes to be the defense of liberties of the people, than a Court that, out of fear or sense of obligation to the appointing power or factional passion, approves any measure we may enact. We are not the judges of the judges. We are not above the Constitution."

The U.S. Constitution, one of the oldest governing charters of any nation in the world, has survived periods of change, crisis, and war. Its longevity is due in large part to our unique, independent judiciary. By rallying to protect the federal courts, Congress can help safeguard our heritage of individual rights.

Whose Prayer? How the School Prayer Amendment Attacks Religious Liberty

by
Rev. M. William Howard

It is pure irony that the President of our nation, who has pledged so earnestly to "get government off the backs of the American people," has seen fit to promote a new role for government in one of the most sacred of private activities—prayer. On May 17, 1982, President Ronald Reagan sent to the United States Congress a proposed amendment to the Constitution which would not only allow government-run schools officially to set aside time for prayer during the school day, but would also allow school officials to direct this activity and even to determine the appropriate content of the prayer to be uttered.

This represents bold and unacceptable interference by the State in religious devotion. This proposed amendment should be defeated, and the efforts of the last two decades to undercut the Supreme Court rulings on the matter of prayer in the public schools finally should be put behind us.

I am sympathetic to some of the sentiments which lead a large percentage of those polled to say they support "voluntary" public-school prayer. I share the concern of many about the moral fabric of our society, about crime, about rising teenage pregnancy and about unabated drug use among young and old. I am deeply

troubled about the sometimes disastrous pressures that are mounting against the family, the increasing divorce rate and the problem of teen runaways. I share the overall feeling that things are changing around us so rapidly that we have less and less control over the destiny of our lives, and that our quest for stability and meaning is being frustrated by external forces. It is also true for me, a deeply religious person and a Christian minister, that efforts I may undertake to help solve these problems will be informed by my faith in God.

I believe in prayer, and I know the power of prayer from personal experience. Family prayer is at the center of my family tradition, and we pray together often in our home. We also worship together as frequently as possible, and there are times, frankly, because the meaning derived from these experiences is so rich, that I wish all humankind could share in them with me. So I know first hand the confidence that is reflected in the affirmation, "God answers prayer." And when the troubles of life seem to overwhelm me, it is very much a part of my religious commitment to "take it to the Lord in prayer."

This is the view, no doubt, of persons who would have school children pray together as they begin their school day. They believe that if children are taught to pray at an early age, this will automatically have some lasting impact on their conduct and on their sense of good citizenship and good neighborliness later in life.

Whatever our personal views and reliance on prayer may be, however, we do have an important duty as citizens of the United States to study quite carefully the implications of our government's self-designated role in our religious affairs.

It is urgent to keep in mind that the freedom we have to believe as we do is secured in large measure by the respect we have for others' rights to believe and to teach their children as they choose.

The authors of the Bill of Rights knew all too well that democratic governments can be subject to the political will of the majority. This is why they sought to guarantee certain rights to the individual which the majority could not take away. Religious devotion is one of these rights. It is written in the First Amendment simply that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." That the proposed amendment would violate this principle can be best illustrated by a quote from a paper being circulated by the White House explaining how, in the Administration's view, the new amendment would work:

"Since the voluntary school prayer amendment will eliminate any federal constitutional obstacle to voluntary school prayer, states and communities would be free to select prayers of their own choosing. They could choose prayers that have already been written, or they could compose their own prayers. If groups of people are to be permitted to pray, someone must have the power to determine the content of such prayer."

I say, exactly! *Someone* must have the power to determine the content of such prayers, but who? *Who* will decide is precisely the issue.

There is much talk about the lack of religious freedom in socialist countries, and proponents of the school prayer amendment say they are eager for "our" children to have the chance not to grow up to be atheists. Religious intolerance, bigotry and restriction is not, however, the exclusive purview of atheists and communists. In fact, history shows that deeply religious

people are often the most guilty of intolerance, not just toward non-believers, but toward people who believe very deeply in something *different*.

Our society sometimes takes pride in the variety of great traditions which our system of government allows to exist together in a climate of relative civility. It is one of the laudable assets of our heritage. This variety is not declining, but increasing. Not only are people of different races, languages and cultures coming to live among us, but persons of religious traditions quite unfamiliar to many Americans are also coming to make this nation their home. The migration of peoples to these shores is at the core of the nation's identity.

These new Americans will pay taxes, their children will enroll in the public schools, and they are likely to be minorities in the communities where they live. What will be their recourse during the time set aside for prayer if the new amendment is adopted? Does majority rule apply when the rights of religious minorities are concerned? Whose rights will be observed when today's religious minority is tomorrow's religious majority? Will today's prayer advocates then change their tune? Could it be that those who support school-sponsored prayer take this position because they assume "their" prayer will be the chosen prayer?

In the midst of the discussion going on about state-sponsored prayer, my mind goes back to the opportunity I had to visit Iran to minister to the Americans being held hostage there in 1979. In Iran, religious fundamentalism is the basis of severe persecution by the government of those holding different religious beliefs. While Iran is admittedly a vastly different culture than ours, I believe we can learn a good deal about what happens when a particular religious view becomes synonymous with governmental authority by looking at the

Iranian example. One person's religious conviction becomes another's tyranny.

The version of the amendment which the White House has submitted to Congress attempts to answer the problems of religious minorities, and of peoples with no religion, by adding a sentence that states: "No person shall be required by the United States or any state to participate in prayer." However, instead of solving the problem, this sentence sets the stage for more confusion.

Consider for the moment that a third grade child from a Hindu family attends a school which is largely Protestant Christian. For the sake of discussion, let's say that the Protestant parents could agree on an appropriate prayer for their children. Then imagine, in a practical situation, what it would take for the Hindu child not to be drawn into the approved Protestant prayer under the threat of being "set apart" by his peers. And what of the Hindu teacher who may be expected to lead their prayer? Will that teacher's job be threatened for refusing? And if the teacher consents to lead the prayer, will it be convincing or effective if the teacher really doesn't have the "feel" for that kind of prayer?

Advocates of public school prayer have presented this matter as a contest between believers and atheists, but I predict that any such conflict will not be nearly as disruptive as that which will surface between believers and other believers.

We all agree that freedom from religious persecution was one of the nation's founding principles, yet the history of this nation is cluttered with examples of how we have lost sight of that principle and fallen victim

to the emotional impulse of the moment. In times such as these, the stated credo of the republic and the interpretations of its highest court have saved the day. The genius of these safeguards was not born of someone's imagination, but of bitter experience in pre-colonial Europe.

There is inevitably an extra-rational dimension and a sense of righteousness to the beliefs of religious adherents, and this reality does not always lend itself to the same level of respect for the beliefs of others. For this reason, the practice of religious devotion necessarily must be beyond the reach of political manipulation. The government's best law about it (that there shall be *no* law) has already been passed. The Supreme Court, because it is relatively free from contemporary whims and pressures, must be the highest temporal judge.

But let us be straightforward and honest with one another; some Americans have never accepted the fact that this nation provides basic federal guarantees. Some among us have historically argued for the rights of individual states to determine standards of behavior which have been clearly guaranteed by the federal Constitution. This line of thinking has fed years of criticism of the Supreme Court, which is charged with interpreting the Constitution for everyone in the United States. And it has motivated repeated efforts, by acts of Congress, to take away the Court's jurisdiction over certain civil rights issues.

During the struggle for racial justice in the civil rights movement of the 1960's, many of the same advocates of "states rights" openly criticized the Supreme Court. Their way of understanding government is now reflected in the President's school prayer proposal. In order to be a nation and not just a collection of separate

states, though, we must stand for certain universally applied laws and standards of civil authority. Without these, we are even more subject to polarization and disintegration. Without these, we are more open to counter-productive civil strife.

The surest way for us to guarantee our precious freedom of religion is to keep the government out of the business of religious devotion. There are already many positive options open to us to keep alive our valued religious customs without getting the government, or government-run institutions involved.

The first thing we need to do as parents is to take more responsibility for the religious training of our children. The very best places for religious guidance are the home and the house of worship. There is so much we don't do to take advantage of these two places for religious nurture.

Parallel to that is our responsibility not to overestimate what prayer in schools can do to help our children compared to what we can do ourselves. We simply must not be duped by the brand of religious demagoguery which asks us to believe that all of society's ills are due to the absence of school-supervised prayer. One man, in testifying before a Congressional committee in 1980, linked the assassinations of Robert F. Kennedy and Martin Luther King, Jr. to the 1963 Supreme Court decision on prayer. Ordinarily, one could dismiss this kind of bizarre claim with the ridicule it deserves, but I am troubled that too many sincere people seem to accept these assertions without much critical thinking.

Moreover, we should be more informed about the rights we already enjoy as the law now stands. Children *can* voluntarily pray in schools. That's a fact. They may pray privately at their conven-

ience or they may assemble in groups during free time to pray at their own choosing. They are, however, not to pray during the official school day and they are not to be led in prayer by school personnel. We also have the opportunity, which we have largely neglected, to introduce courses of study on different world religions into our school curricula, to enhance our children's appreciation of the religious quests of the world's peoples. This could also be a way of acquainting students with religions as integral parts of cultural heritages.

What I think we *don't* want is government-supported evangelism or proselytizing. This would only be asking for problems which our already-troubled public schools don't need. Instead, America's public schools need our help to be restored as free spaces for learning by all children, without intimidation. An important ingredient in this environment is their discovery of what they *share*—not the belaboring of what makes them distinct and separate. Knowing more fully what we, this rainbow of humanity, share together as Americans, is not only the greatest hope for the future of our society, but it could help us begin to maximize our opportunity to demonstrate that peoples, heretofore travelling radically different roads, can meet at the same junction.

One way of missing this opportunity, I believe, is to turn our public schools into battlegrounds for a holy war.

Since 1972, the Reverend M. William Howard has served as Executive Director of the Black Council of the Reformed Church in America. He has recently completed a three-year term as President of the National Council of Churches and currently chairs its Information Committee. Rev. Howard is a native of Americus, Georgia, and is a graduate of Morehouse College. He is a board member of the National Urban League, the Independent Sector and PEOPLE FOR THE AMERICAN WAY.

Mr. McCLELLAN. The committee is adjourned.
[The committee adjourned at 2 p.m.]

PROPOSED CONSTITUTIONAL AMENDMENT TO PERMIT VOLUNTARY PRAYER

THURSDAY, SEPTEMBER 16, 1982

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 3:18 p.m., in room 2228 Dirksen Senate Office Building, Hon. Strom Thurmond (committee chairman) presiding.

Present: Senator Specter.

Staff present: Eric Hultman, general counsel; Mike Klipper, chief counsel, Criminal Law Subcommittee; and Mary Louise Westmoreland, counsel, Juvenile Justice Subcommittee.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee will come to order.

Another Senator was to chair the hearings here, and I just got word, 5 minutes ago, that he was not here, so I canceled other plans to come on up so it would not inconvenience you people any more than we could help.

Today the committee continues its hearings on Senate Joint Resolution 199, a proposed constitutional amendment to permit voluntary prayer in schools. We are privileged today to have a group of witnesses who have, either in their law practice, or in the academic field, given great thought to this matter of voluntary prayer in schools.

As you may know, this matter is presently being debated on the Senate floor this afternoon in the context of an amendment to the pending debt limit bill. Although that amendment differs somewhat from Senate Joint Resolution 199, which is a constitutional amendment, the question of voluntary prayer is an important one to an overwhelming percentage of Americans. The testimony we will hear today will be helpful to the resolution of the legal barriers preventing children from engaging in voluntary prayer in schools.

I believe our first panel this afternoon is composed of Mrs. Hermine Herta Meyer—Mrs. Meyer, glad to have you with us—Mr. James M. Smart, Jr.—Mr. Smart, if you will come around, attorney at law at Kansas City—Mrs. Meyer is from Chevy Chase, I believe—Prof. Grover Rees, University of Texas Law School, Austin, Tex.

Now, we will be pleased to hear from you all in such order as you care to present your cause.

Professor Rees, do you wish to go first or last?

Mr. REES. I was told that I was last on the program. If you want to change it, it is all right.

The CHAIRMAN. All right, we will take Mrs. Meyer.

Mrs. Meyer is first on the list. We will take her first.

Now, I was thinking this, if you have long statements, my suggestion is that you put them in the record, and then just summarize briefly.

Does that suit you all right?

Is this your statement, Mrs. Meyer? You have got a pretty long statement here, Mrs. Meyer.

Mrs. MEYER. I shall summarize it.

The CHAIRMAN. Seventeen pages, so without objection, we will put this in the record, and if you will take 5 minutes to summarize.

In order to hear all of these witnesses, and some of them have come a long distance, we are going to have to ask all of you just to put your entire statement in the record, where it is available for all the Senators, and give you 5 minutes each to summarize it.

So, Mrs. Meyer, you may proceed.

STATEMENTS OF HERMINE HERTA MEYER, ATTORNEY AT LAW, CHEVY CHASE, MD., ACCOMPANIED BY MARY ELIZABETH BULL, PRESIDENT, MARYLAND INTERFAITH COMMITTEE FOR SCHOOL PRAYERS, CHEVY CHASE, MD.; JAMES M. SMART, JR., ATTORNEY, SMART & WHITEHEAD, KANSAS CITY, MO.; GROVER REES, UNIVERSITY OF TEXAS LAW SCHOOL, AUSTIN, TEX.

Mrs. MEYER. Mr. Chairman, I thank you for this opportunity to appear before you on behalf of the State of Alabama, and explain why the State of Alabama cannot support S. —.

The CHAIRMAN. Go ahead, Mrs. Meyer, I am listening to you.

Mrs. MEYER. Why the State—

The CHAIRMAN. What are you waiting for?

Mrs. MEYER. Yes.

I am here to explain why the State of Alabama cannot support the amendment.

Originally, I was also supposed to speak on behalf of the Maryland Interfaith Committee for School Prayers, whose founder and president, Mrs. George G. Bull, is right here, sitting next to me, and therefore I can only speak for the State of Alabama, and Mrs. Bull would like very much to be permitted later to make a very brief statement on behalf of her committee, less than 1 page.

Now, I wish to point out, however, that the wishes of the Maryland Interfaith Committee for School Prayers and those of the people of Alabama, as expressed by their legislature and their Governor, are the same, namely, to enable the people in the States to have prayers in their public schools if they so wish.

But the reasoning of the Maryland Interfaith Committee for School Prayers is simply that they have tried for so many years, in vain, to get Congress to pass a law to prevent the Federal courts from taking jurisdiction in cases relating to school prayers that they now hope that they might accomplish this purpose through a constitutional amendment.

Now, I want to explain briefly the reasons for our opposition. In the message to the Congress of May 17, 1982, President Reagan said: "Since the law has been construed to prohibit this—meaning prayers in the schools—I believe that the laws should be changed."

But what does the President mean with "the law"? The Constitution? In that case, the Constitution needs no change, because it does not prohibit any prayers anywhere. Or does he mean a Supreme Court decision? This would mean that the Supreme Court decision interpreting or pretending to interpret a constitutional provision takes the place of the constitutional provision itself.

But this would permit the Supreme Court to change the Constitution in the guise of constitutional interpretation and would bring it into unsurmountable conflict with article V of the Constitution which provides that the Constitution can be changed only by persons elected by and responsible to the people, namely by the consent of two-thirds of Congress and the consent of the legislatures or conventions of three-fourths of the several States.

The proposed amendment would carry this conflict.

[Pause.]

Mrs. MEYER. Well, may I proceed?

Senator SPECTER [presiding]. I am sorry for the change in personnel, but this is a particularly bad day, among the string of just generally bad days, and Senator Thurmond has other commitments, but I have come here to replace him. But you may proceed.

Mrs. MEYER. The proposed amendment would carry that conflict right into the Constitution, because it would, for the first time, place into the Constitution an indirect admission that a Supreme Court decision interpreting or pretending to interpret a constitutional provision takes the place of that constitutional provision itself, which can be changed by the people only by a constitutional amendment pursuant to article V.

Now, I have explained why some previous amendments, 11th, 14th, and 16th, do not really change a Supreme Court decision, as so very often has been said, but the 11th and 16th amendments are changes of existing constitutional provisions which cannot be changed without a constitutional amendment.

The 14th amendment, a citizenship clause, at that time, also changed—changed something fundamental, because at that time the power of the—the Congress had the only power of making rules with respect to naturalization and the power to declare who should be a citizen by birth was still in the States. There was, therefore, a retained right which had to be taken away from the States and put into the Constitution, and for that you need a constitutional amendment.

So the previous three amendments were always needed because of some constitutional situation, not because of a Supreme Court decision. So this would be the first time in the school prayer cases, there is no such situation.

As pointed out by President Reagan in his message to Congress, the purpose of the amendment proposal is to allow communities to determine for themselves whether prayer should be permitted in their public schools, and to allow individuals to decide for themselves whether they wish to participate in prayer.

Now, this is precisely the law under the Constitution as it exists today. As far as I know, as far as anybody knows, there is only one Constitution of the United States, namely the Constitution which was drafted by the delegates of 12 States at the Federal Convention of 1787, and later ratified by the highest authority of each of the Thirteen Original States, namely by State Ratifying Conventions elected by the people of the several States. Because of the confusion of the test which has arisen with respect to this Constitution, I think I should state very briefly some of its background.

By this Constitution, the States created a Government of the United States to which they delegated some of their own powers. The Supreme Court itself has admitted that outside of this Constitution, no Federal power can legitimately exist. I cite—I am not mentioning the cases. They are in my statement.

The powers not delegated by the Constitution to the United States nor prohibited by it to the States have remained in the States. With respect to those powers, the States have remained completely sovereign. The only constitutional way to take any of these reserved powers from the States is through a constitutional amendment pursuant to article V, which is the only legal way to amend the Constitution of the United States.

No power to make laws with respect to religion appears in the original Constitution, nor has it been taken over by any of the first amendments. And the Supreme Court has never said that.

The restrictions—well, I will leave that out.

Now, there is only one provision—one of the provisions of the Federal Bill of Rights which are amendments 1 through 8, was later made applicable to the States by the 14th amendment, namely the due process laws of the 5th amendment. No other provision of the Federal Bill of Rights has been made applicable to the States through a constitutional amendment, and this has been confirmed by the Supreme Court many times, and I cite these cases at pages 5 and 6, where it was expressly set, particularly in *Barthkus v. Illinois*.

We have heard from the beginning, and uniformly, that the due process clause of the 14th amendment does not apply to the States any of the provisions of the first eight amendments as such. And then they go on.

Now, in the school prayer cases, the Supreme Court did not interpret the Constitution. In the school prayer cases the Supreme Court never looked at the 1st amendment, nor did it ever try to find out where the 14th amendment had made them applicable to the States, and I explained that also in detail, which I have to leave out, because you do not give me enough time to read it. They simply took the right, which they did not really have, to declare any law oppressive or fundamental, and then they assumed the right to just stick it into the due process clause, where it has absolutely no place.

Senator SPECTER. Do not pay any attention to this light, because it is starting at 5 minutes. We are going to use it for other witnesses.

Mrs. MEYER. May I just read the end of it?

Senator SPECTER. Yes.

Mrs. MEYER. Where I come to the dangers of Senate joint resolution, and at the end I just have to leave out.

The Senate Resolution 199, if adopted as part of the Constitution, is apt to have an effect opposite to that which was intended.

The first sentence, standing alone, could be considered of the same nature as the first 10 amendments which, as the Senate explained in its preamble thereto, were "declaratory and restrictive clauses" which had been added to the Constitution upon the desire expressed by the conventions of a number of the States at the time of adopting the Constitution, in order to prevent misconstruction or abuse of its powers.

But the last sentence of the proposed amendment is a trap which would catch the States again in the net of Supreme Court jurisdiction, except that the Supreme Court could do then legally what it is doing now only by usurpation.

I have explained why they have no jurisdiction, that the Constitution has nowhere given them—has nowhere granted Federal judicial power in cases of individuals against a State, or cases between individuals of the same States arising under the retained right of the State. And religion is still a retained right of the States, that the States have been prevented to exercise that right, because the Supreme Court decision has been given a sacredness, as Lincoln said, which has absolutely no place in the Constitution now—

Senator SPECTER. Mrs. Meyer, would you conclude now, please?

Mrs. MEYER. Yes.

And then if that is left in, a claim that school prayers are not voluntary, would then not be a claim arising under the retained rights of the States, but a claim arising under the Constitution, for which Federal courts can rightfully take jurisdiction pursuant to article III of the Constitution.

If this amendment proposal is adopted as drafted—this is my last sentence—the people might soon find themselves in the same predicament as they are today. The Supreme Court will be able to destroy school prayers by an interpretation of required participation, as surely as it does today.

Then I say at the end, that the best way to reestablish Constitutional conditions is really if Congress would finally pass a law preventing the Federal courts from taking jurisdiction, they would not take anything from them, because they have no jurisdiction. It is a participation. They would only prevent them from taking jurisdiction.

Senator SPECTER. Mrs. Meyer, Thank you. Thank you very much. Your full statement will be made a part of the record.

Mrs. MEYER. Oh, you were not here. I was supposed to represent, not only Alabama, which I actually now represent, but also the Maryland Interfaith Committee, but they are for the Constitution, so this is the president and founder, and she wishes to say just a few words.

Senator SPECTER. Well, we do not have you on the panel, and we have other panels here, who have been waiting.

Ms. BULL. This is only three-quarters of a page, and Mr. Hultman said I should ask you. I have only this much on the page.

Senator SPECTER. Well, will you submit it so that I can take a look at it?

Ms. BULL. I have——

Senator SPECTER. Excuse me. Excuse me.

I will take a look at it while we hear the other panelists, and we will decide, depending on how much time we seem to have.

Our next witness is Mr. James Smart, attorney at law, Kansas City, Mo.

We welcome you, Mr. Smart. We have your prepared text, which will be made a part of the record, and we are going to start using the clock now. So when the green light goes on, it is 5 minutes, and when the red is on, the time is up.

Mr. SMART. Thank you, Mr. Chairman.

It is a pleasure to be here, and I will attempt simply to summarize, and to emphasize some of the key points of my statement. I am not here as a special fount of wisdom of what would be best in an ideal world, but I am here as a person who has some familiarity with the first amendment, the historical materials related to it, and the cases that have construed it.

I had the privilege of being the attorney handling a case involving the religious rights of university students at the University of Missouri, and in the course of working with that case over 5 years, I began to understand a little bit of what the case was about.

In the process of my study and reflection upon the first amendment, the cases and the materials, historical materials, I have struggled, in my own mind, to come with a—come up with a basic understanding of what essential values this amendment is attempting to protect.

I found that—nice little phrases, like the wall of separation, and other things are surface descriptions, even the Supreme Court's three-part test with relation to determining whether the establishment clause is violated or not, seems inadequate to come to grips with the real values.

In the course of my work on the *Widmar v. Vincent* case, I had occasion to reread the opinion of the—the concurring opinion of Justice Harlan in the *Walz v. Tax Commission* case of 1969, involving tax exemption for religious institutions, and in the course of rereading that opinion, I came to believe that he put his finger on something important, when he stressed that the establishment clause is designed to protect the concept of volunteerism and the concept of neutrality, and by volunteerism, is meant individual freedom of choice, and by neutrality, of course, it is governmental neutrality.

The Government, of course, has no freedom of religion, it has merely a duty to engage in a friendly tolerance toward religion, a duty to accommodate the free exercise of religion, without establishing a religion, and without favoring a denomination.

It is also important to note that the concept of neutrality is underlaid by the concept of protecting religion from being corrupted by involvement with the Government, and by protecting religions from persecution. These were pointed out by Justice Black in the *Engle* case.

Therefore, both volunteerism and neutrality are designed to protect the purity of genuine religion, and to protect freedom of conscience. Neutrality was never designed to cause the State to give religion a cold shoulder, or to hold religion in utter indifference,

and we have in the appendix to my statement a list of cases and incidents which demonstrated a perversion of these values, and our greatest concern—my greatest concern is the fact that the establishment clause has come to be construed in many cases, in such a way that it puts the State in a position of hostility to religion.

The *Widmar* case did help clear some understanding in this regard, dealing with making clear that university students have equal access rights for religious purposes. A week later the Supreme Court denied certiorari in the *Brandon v. Board of Guilderland* case, which is in the appendix, and it is my position that the *Brandon* case has faulty reasoning in it, that there could be problems in any high school situation with Government sponsorship, but that those problems could be worked out by careful regulations controlling them.

We submit, therefore, that there is a need. Because the rights of students, particularly in secondary schools around this Nation, are being infringed by unduly restrictive interpretations of the establishment clause, there is a need for action in this area.

I submit to this committee that it would be appropriate for this committee to consider legislation such as is discussed in page 3 of my memorandum, that—or page 4, rather, of my memorandum, which would read essentially as follows—and this was originally proposed by the Christian Legal Society:

No public secondary school receiving Federal financial assistance, which generally allows groups of student to meet during noninstructional periods shall discriminate against any meeting of students on the basis of the religious content of the speech at the meeting, provided that the meeting shall be voluntary and orderly and that no activity which is in and of itself unlawful need be permitted.

Such legislation would be constitutional, I believe, and I have been informed that the Senate Legislative Counsel also shares that opinion, that that type of legislation would be constitutional.

What it would do, would give the Congress an opportunity to do something to preserve voluntary religious freedom in this country, without getting involved in active sponsorship of religion in an area that is fraught with political device and concern.

We urge the——

Senator SPECTER. Mr. Smart, I do not think that our lights are working. We are up to 7 minutes.

Mr. SMART. OK.

That is basically everything that I had to say.

I would urge the committee to give consideration to consolidating hearings on this type of legislation with the President's concurrence.

Senator SPECTER. Thank you very much, Mr. Smart.

Our next witness is Prof. Grover Rees, the University of Texas Law School.

We welcome you, Professor. We have your statement. It will be made a part of the record fully, and we would ask you to summarize within 5 minutes.

Mr. REES. Yes, sir.

I am here to testify in support of Senate Joint Resolution 199. I have no particular qualifications to speak to the question whether school prayer is desirable, but I have appended to my written statement a piece that I wrote on the merits of school prayer. I did work

with members of the White House staff in helping to draft the amendment, so I hope I can be of help to the committee in suggesting answers to objections that I have heard raised, and that I understand probably will be raised today in a later panel.

First, it should be made clear that the amendment would not require that a single prayer ever be said by anyone in any school. It would simply provide that the decision be made by State and local education authorities, subject to the rights of individual conscience, rather than by Federal courts. I think that this transfer of decisionmaking power would be a good thing.

I also think that it is important to observe what kind of a constitutional amendment we are talking about. This proposal would make no change at all in the Constitution as it was understood by those who framed and ratified it. Rather, it would have the effect of reversing certain decisions of the U.S. Supreme Court.

As I tried to show in my written statement, these decisions were not based—did not even purport to be based—on interpretation of the Constitution, as most people would understand the word “interpretation.”

The establishment clause was originally intended to prohibit the Federal Government from establishing a national religion. The argument that the 14th amendment incorporated the establishment clause, made it binding on the States, is a very tenuous one. It seems to conflict with what people thought in 1875, when it was proposed to amend the Constitution to provide an establishment clause for the States. Everybody who debated the issue in Congress, on both sides, presumed that there was no establishment clause for the States. Even the people who wanted one—even the people who felt that in 1875 that the States should not be allowed to establish religion—put in their proposal a specific provision making it clear that it would not prevent Bible reading in the schools.

So the school prayer decisions were ahistorical decisions. The opinions spoke in terms of fundamental values, by which I think the Justices meant fundamental contemporary values. The Justices believed that it was their role to select and enforce such values. But many Americans disagree.

Yet, because the court enforces its policies under the rubric of enforcing the Constitution, an amendment is the only effective way to reverse a Supreme Court decision. When an amendment is proposed, therefore, that would chip away at a piece of the 20th century judicial Constitution and restore a part of the original understanding, it strains the limits of honest advocacy to accuse supporters of the amendment of being radicals who are cluttering up the fundamental document with their particular causes and ideologies.

I think that rhetoric is best addressed to the court which makes a decision that puts the burden of constitutional amendment on those who prefer the original understanding.

The amending process, unlike the power of the judges to impose their own values—or their own perception of fundamental values—on the public, is part of the fundamental document. Its legitimacy is unquestioned. Only its wisdom can be questioned. And in judging the wisdom of amendments designed to reverse new judge-made laws, scholars should remember that many Americans value the

Constitution, not simply for the sake of having one, but for what it says.

I would like to address myself briefly to some of the horror stories that have been told by opponents of the prayer amendment. They talk about forcing people to participate in prayer; yet the amendment explicitly provides that no such requirement can be imposed. The trick is that the definition of coercion has been expanded to include subliminal pressure to conform. This, I think, is a problem that is inherent, not in the nature of prayer, certainly not in the amendment, but in the nature of public education. Schools teach values as well as information.

Many people object to the particular things that are taught to their children, but even the most vehement opponents of such things as sex education and flag salutes, seek only to have their children excused participation, or perhaps to have their school boards exclude the offending programs from the curriculum. Nobody seeks to have the courts declare these things unconstitutional. Similarly, one must distinguish between whether school prayer is undesirable and whether it is unconstitutional. No matter how undesirable one believes it to be, our constitutional system requires that the question of its desirability be decided by State and local governments, not Federal courts.

There is one other objection that I want to speak to, which is that this amendment will empower governments to "write their own prayers." I presume that what is meant by that, since nobody imagines that the legislature is going to compose the prayer in a joint session, is that the governments will be free to choose prayers that are written by people who are still alive rather than by people who are dead. And this is true. The power to have something includes the power to choose it. Right now, the Federal courts have the power to pass judgment on prayers, or to prohibit them altogether, under the power that they have assumed in the school prayer decisions. To those who think that the local governments would abuse the power to choose the prayers that would be said in schools, subject to the rights of individual conscience, I would simply say that some of us trust the local school boards, and educational authorities, more than we trust the Federal courts. We should trust our communities more than we trust the courts, and we should transfer the decisionmaking power back to the communities, where the framers of the Constitution intended it to reside.

Senator SPECTER. Mrs. Bull, I have read your statement. We will make it a part of the record. If you press to read it, you may do so.

Ms. BULL. I would like to.

Senator SPECTER. It would take less time for you to read it than to discuss it.

Go ahead.

Ms. BULL. Mr. Chairman, can you hear me?

Senator SPECTER. I sure can.

Ms. BULL. Members of the Senate Judiciary Committee, and ladies and gentlemen, I am Mary Elizabeth Bull. I am president of the Maryland Interfaith Committee for School Prayer.

The Maryland Interfaith Committee for School Prayer was built on good will. It was established in 1980 by persons of different faiths, believing in one God, to reestablish the positive aspects of

school prayer in the State and in the country. We believe that the United States is one Nation under God, one God, which is implicit in our Pledge of Allegiance and in our National Anthems.

We are a Judeo-Christian Nation.

We believe that, just as in our Congress, different faiths are represented by different prayers, it is not necessary to reach theological agreement to invoke divine guidance and blessings on our students in schools. Interfaith prayers would unite students, teachers, and parents who believe in one God.

We believe that because this is the United States of America, and we are one Nation, under one God, we do not have to recognize every cult or polytheistic religion. Readings from the Old and New Testaments and Holy Writ—without comment—in the public schools should be reinstated to promote toleration, moral determination, and goodwill among students, parents, and teachers. By continuing to prohibit the free exercise of religion, this unconstitutional practice is causing over 75 percent of our people anguish and unnecessary injustice and discrimination.

We believe that American students, teachers, and parents have been misled, misinformed, and confused for over 20 years about school prayers. And because of that confusion, President Reagan, in all good faith and sincerity, has spoken to restore good will among our people on this issue, and to clarify this very controversial matter. The 37-word proposed constitutional amendment, if passed and ratified, would reestablish the constitutional right to pray in the public schools, while protecting the right not to pray for those who earnestly desire it.

We believe that President Reagan's intention and foresight should not be underestimated. He recognized that there are those who would destroy this Nation under God. We, who are determined to keep our Nation under God, must speak loudly and clearly for Him whenever our freedoms are endangered. By bringing back the right of States to make their own laws respecting religion, government of, by, and for the people shall not perish from our land.

Senator SPECTER. Thank you very much.

Ms. BULL. Mr. Chairman, how can we say to ourselves and to others that we have religious liberty in this country, when people are silenced, and said that they cannot even say silent prayers in schools?

Thank you.

Senator SPECTER. Thank you very much, Ms. Bull.

Senator Thurmond has left certain questions, which he has requested I ask.

Mr. Smart, this question is for you. [Pause.]

These are for the panel as a whole. [Pause.]

Because of the lateness of the hour, we think it may be satisfactory if we submit these to you in writing, which we shall do.

So we thank you very much for coming.

Ms. BULL. Will our statements be included in the record?

Senator SPECTER. They all will be.

Ms. BULL. Thank you.

[The prepared statements of Mrs. Meyer and Messrs. Smart and Rees follow:]

PREPARED STATEMENT OF HERMINE HERTA MEYER

Mr. Chairman and Members of the Committee:

I thank you for this opportunity to appear before you on behalf of the State of Alabama and explain why it cannot support S.J.Res.199.

Originally, I was also supposed to speak on behalf of the Maryland Interfaith Committee for School Prayers, whose founder and President is Mrs. George G. Bull of Chevy Chase, Md. But the Maryland Interfaith Committee for School Prayers wishes to support S.J.Res.199. Therefore I can only speak on behalf of the State of Alabama whose views, as expressed by its Governor Bob James, coincide with my own.

I wish to point out, however that the wishes of the Maryland Interfaith Committee for School Prayers and those of the people of Alabama, as expressed by their Legislature and their Governor, are the same, namely to enable the people in the States to have prayers in their public schools if they so wish. But the reasoning of the Maryland Interfaith Committee for School Prayers is simply, "we have tried for so many years in vain to get Congress to pass a law to prevent the federal courts from taking jurisdiction in cases relating to school prayers that we now would like to try another way."

Reasons for Opposing Senate J.Res. 199.

S.J.Res.199, as suggested by President Reagan and drafted by his Administration, reads:

"Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any State to participate in prayer."

of May 17, 1982,

In his message to the Congress, President, Reagan said: "Since the law has been construed to prohibit this (meaning school prayers), I believe that the law should be changed." But what does the President mean with "the law?" The Constitution? In that case, the Constitution needs no change because it does not prohibit any prayers anywhere. Or does he mean a Supreme Court decision? This would mean that a Supreme Court decision interpreting or pretending to interpret a constitutional provision takes the place of the constitutional provision itself. But this would permit the Supreme Court to change the Constitution in the guise of constitutional interpretation and would bring it into unsurmountable conflict with Article V of the Constitution which provides that the Constitution can be changed only by persons elected by and responsible to the people, namely by the consent of two thirds of Congress and the consent of the Legislatures or Conventions of three fourths of the several States.

The proposed amendment would carry that conflict right into the Constitution because it would ^{for the first time} place into the Constitution an indirect admission that a Supreme Court decision interpreting or pretending to interpret a constitutional provision takes the place of that constitutional provision itself, which can be changed by the people only by a constitutional amendment pursuant to Art.V.

It has often been said that the 11th, 14th and 15th Amendments are precedents for such a theory. However, the 11th Amendment was needed to change the clauses in Art.III, Sec.2 of the Constitution that federal judicial power shall extend to controversies between a State and citizens of another State or of a foreign State; the 16th Amendment also was necessary to change a constitutional provision, namely Article I, Sec.9, clause 4; and the citizenship clause of the 14th Amendment was needed because before that, Congress had only power to legislate with respect to naturalization (Art.I, Sec.8, cl.4), while the power to determine citizenship by birth was still in the States. It was, in other words, a power retained by the States which could legally be transferred to the U.S.Constitution only through a constitutional amendment in accordance with Article V, because it added something to the Constitution which, as the Supreme Court said, could only be done through a constitutional amendment pursuant to Art.V. See Ullmann v. United States, 350 U.S.422 (1958).

In the school prayer cases there is no such situation. As pointed out by President Reagan in his Message to Congress of May 17, 1982, the purpose of S.J. Res. 199 is to "allow communities to determine for themselves whether prayer should be permitted in their public schools and to allow individuals to decide for themselves whether they wish to participate in prayer." But this is precisely the law under the Constitution as it exists today.

As far as I know, as far as anybody knows, there is only one Constitution of the United States, namely the Constitution which was drafted by delegates of 12 States at the Federal Convention of 1787 and later ratified by the highest authority of each of the 13 original States, namely by State ratifying conventions elected by the people of the several States. Because of the confusion which has arisen with respect to this Constitution, it is necessary to state briefly its historical background.

By this Constitution, the States created a Government of the United States to which they delegated some of their own powers. They are enumerated in the Constitution. In order to carry into execution these enumerated powers, Art.I, Sec.8, cl.18 authorized Congress to make all laws which shall be "necessary and proper" for this purpose. These are the only "implied" or "inherent" powers possible in the Constitution.

The Supreme Court itself has admitted that outside of this

Constitution, no federal power can legitimately exist. See Reid v. Covert, 354 U.S. 1, 5- 6 (1957).

The powers not delegated by the Constitution to the United States nor prohibited by it to the States have remained in the States. With respect to those powers, the States have remained completely sovereign. The only constitutional way to take any of these reserved powers from them is through a constitutional amendment pursuant to Article V, which is the only legal way to amend the Constitution of the United States.

No power to make laws with respect to religion appears in the original Constitution. That power, therefore, had been retained by the States.

The first ten amendments to the Constitution were added upon request of the States. The purpose of Amendments 1-8, the so-called Federal Bill of Rights, was to secure for the individual the same protection from the federal government which the people of the several States had secured in the constitutions of the several States from their State governments. This will be easily understood if it is remembered that during the Federal Convention of 1787, where the Constitution was drafted, and also later during the ratifying process, Madison and Hamilton had pointed out that, while the old Confederation the federal powers operated almost exclusively on the States, the new "general government" was to operate mostly directly on the individual.¹⁾

The restrictions in Amendments 1-8 were all powers retained by the States. The Ninth Amendment was added in order to guard against an interpretation that, by enumerating particular exceptions to the grant of power to the federal government, those rights which were not singled out, were intended to be assigned into the hands of the general government by implication and were therefore insecure. 1 Annals of Congress 439. The Ninth Amendment reads:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The rights retained by the people refer, of course, to the rights retained by the people of the several States. As an added precaution to protect the retained rights of the States, several State Conventions, in their amendment proposals, had particularly requested that it should be declared in the Constitution that the powers not therein delegated to the United States, nor prohibited by it to the States, are reserved to the States respectively, or to the people. This became the Tenth Amendment.

One of the provisions of the Federal Bill of Rights was later made applicable to the States by the Fourteenth Amendment, namely

1) 1 Max Farrand, The Records of the Federal Convention of 1787, p. 464; 2 id. p. 9; The Federalist Papers, New American Library ed. 1961, Nos. 16 and 39.

the due process clause of the Fifth Amendment. No other provision of the Federal Bill of Rights has been made applicable to the States through a constitutional amendment. 2)

This has been admitted by the Supreme Court on many occasions, because this is the only logical conclusion which can be drawn from the language and the history of the Fourteenth Amendment. Walker v. Sauvinet, 92 U.S. 90, 93 (1875), holding the Seventh Amendment inapplicable to the States; United States v. Cruikshank, 92 U.S. 542, 551, 553 (1875), holding the First and Second Amendments inapplicable to the States; Davidson v. New Orleans, 96 U.S. 97, 105 (1877), holding the Fifth Amendment's just compensation clause inapplicable to the States; Hurtado v. California, 110 U.S. 516, 534-535 (1884), holding that the Fourteenth Amendment's due process clause had not made the Fifth Amendment's "grand jury" provision applicable to the States; Frank v. Magnum, 237 U.S. 309, 326 (1915), holding that the due process clause in the Fourteenth Amendment was the "settled course of judicial proceedings as established by the law of the State."

As if to reaffirm such rulings, the Supreme Court stated in Prudential Insurance Co. v. Cheek, 259 U.S. 530, 543 (1922):

"... as we have stated, neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restrictions about "freedom of speech" or the "liberty of silence;" nor, we may add, does it confer any right of privacy upon either persons or corporations."

Finally, in Bartkus v. Illinois, 359 U.S. 121, 124 (1959), Justice Frankfurter, speaking for the Court, said:

"We have held from the beginning and uniformly that the Due Process Clause of the Fourteenth Amendment does not apply to the States any of the provisions of the first eight amendments as such. The relevant historical materials have been canvassed by this Court and by legal scholars. These materials demonstrate conclusively that Congress and the members of the legislatures of the ratifying States did not contemplate that the Fourteenth Amendment was a short-hand incorporation of the first eight amendments making them applicable as explicit restrictions upon the States."

It is, therefore, clear, by the Supreme Court's own admission, that there is no constitutional provision which has made the religion clause of the First Amendment applicable to the States. The truth is that the power to legislate respecting religion has never been delegated by the Constitution to the United States

2) See H.H.Meyer, The History and Meaning of the Fourteenth Amendment 72-73 (New York 1977). The 14th Amendment's due process clause reads: "...nor shall any State deprive any person of life, liberty, or property, without due process of law." Its constitutional meaning is that no person may be sentenced to death, or imprisonment, or forfeiture of property without having had access to a proper procedure.

Government and therefore has remained reserved in the several States and their people.

In the School Prayer Cases, the Supreme Court did not interpret the Constitution.

In the school prayer cases, the Supreme Court did not interpret the Constitution, but misused it for the purpose of forcing its own beliefs on the States that there ought to be a complete separation of state and church.

The two leading cases are Engel v. Vitale, 370 U.S. 421 (1962), and Abington School District v. Schempp, 374 U.S. 203 (1963), in which the Supreme Court ruled for the first time that school prayers in State public schools violated the establishment clause of the First Amendment to the Constitution, as made applicable to the States by the Fourteenth Amendment.

In Engel v. Vitale, supra, Justice Black wrote the opinion of the Court. On 14 printed pages, he gave a historical review of the quarrels over the Book of Common Prayer in England and of the history of the early establishment and later rejection of official churches in the American States. But the one thing he did not do was to look into the history of the religion clause in the First Amendment in order to find out its intended meaning, and tell us where in the provisions of the Fourteenth Amendment that clause had been "reinforced," as he said it had.³⁾

In Abington School District v. Schempp, supra, Justice Clark wrote the opinion of the Court. It is 22 printed pages long. But he too did not base it on the constitutional history and meaning of the First Amendment's religion clause. And in explanation of how the Fourteenth Amendment had made that clause applicable to the States, he referred, not to a constitutional provision, but to other cases in which the Supreme Court had ruled that "the liberties guaranteed by the First Amendment" are "embraced" by the "fundamental concept of liberty" embodied in the due process clause of the Fourteenth Amendment. 374 U.S. at 215-216.

Had the judges of the Supreme Court looked at the debates of the First Congress, where the First Amendment's religion clause was drafted, they could easily have found out the intent of the framers, instead of speculating about it. They would have found that it was requested by some States as an assurance that the new Congress would

3) The reason for his vagueness was that J. Black disapproved of the Court's use of the due process clause for the incorporation of the Federal Bill of Rights into the Fourteenth Amendment. He believed that the privileges or immunities clause had done this. Adamson v. California, 332 U.S. 46, 71 (1947), Black, J., dissenting. However, the language of the Fourteenth Amendment as well as its history speak against it. Aside from the due process clause, there was no incorporation of the Federal Bill of Rights by the Fourteenth Amendment. See H.H. Meyer, The History and Meaning of the Fourteenth Amendment, 12-17, 90-111, 112-124 (New York 1977).

not misuse the necessary and proper clause (*supra* p.3) to create a nationwide religion or a national church to which everybody would have to submit, but that there was opposition to the word "national," so that it could not be used. And had these judges looked at the Debates of the Federal Convention of 1787, they would have found out that the opposition to the word "national" in the First Congress was due to attempts in the Federal Convention to create a "national" government which would have reduced the States to administrative provinces by the requirement that every State law should be subject to approval by the national authorities. For that reason, the word "national" was removed from the constitutional text and replaced with "United States." 1 *Farrand* 334, 335. This opposition carried over into the First Congress and influenced the religion clause. The choice of "establishment of religion" in the First Amendment was merely a substitute for "national church."

As explained above, *supra* pp.5-6, the Supreme Court has ruled that the due process clause of the Fourteenth Amendment does not apply to the States any of the other provisions of the first eight amendments. so, for instance, in *Hurtado v. California*, *supra*, and *Bartkus v. Illinois*, *supra*. These rulings are irreconcilable with the Court's rulings in the school prayer cases, in which the Court held that the due process clause of the Fourteenth Amendment did make the First Amendment applicable to the States. In *Abington v. Schempp*, at 374 U.S., 215-216, for instance, the Court relied for those rulings on earlier cases in which the Court said that the liberties guaranteed by the First Amendment are "embraced" by the "fundamental liberties" embodied in the due process clause of the Fourteenth Amendment, citing *Cantwell v. Connecticut*, 268 U.S. 652, 666 (1925).

Any one who can read English and takes the trouble of reading the First and Fourteenth Amendments can easily see that the due process clause does not, like the First Amendment, prohibit any interference with the free exercise of religion, or freedom of speech, or of the press. On the contrary, the due process clause of the Fourteenth Amendment clearly authorizes the States to take life, liberty, or property, but not without some procedure.*

Moreover, the Supreme Court has said that prayers in State public schools violate the First Amendment's prohibition from making any law respecting an establishment of religion, as made applicable to the States by the Fourteenth Amendment's due process clause. The only word which the two provisions have in common is the word "law." But in the First Amendment the Constitution prohibits Congress from making certain laws, while in the Fourteenth Amendment's due process clause the Constitution tells the States that they must have certain laws. How can there be any connection between them? The truth is that there is no connection.

*Text *supra*, n. 2.

Where neither the language of a constitutional provision is considered, nor the intent of its framers, nor its history, we cannot very well speak of constitutional interpretation.

The Supreme Court itself has practically conceded that it has not really interpreted the due process clause,, but has assumed the right to put into it what, in the Court's opinion, are fundamental concepts "implicit in the concept of ordered liberty." Barthrus v. Illinois, 359 U.S. 121, 127 (1959); Falko v. Connecticut, 302 U.S. 319, 324- 325 (1937). In this way, the Supreme Court enabled itself to create a constitutional issue and declare a State law unconstitutional whenever the Court considers it to be "arbitrary, capricious, unreasonable, or oppressive" or, in the Court's belief, it "has no 'rational or justifying' purpose, or is offensive to a 'sense of fairness and justice,'"⁴⁾ although the State law under scrutiny does not violate any constitutional provision. In short, the Supreme Court has misused the Fourteenth Amendment's due process clause as a conduit for extending federal jurisdiction over powers reserved to the States in order to bring them under federal control.

By this practice, the Supreme Court of the United States has attempted to fundamentally change the Constitution without a legal amendment pursuant to Article V. This, the real Constitution, like before it the constitutions of the states, is based on the principles of sovereignty and self- government of the people. In such a system, the decision as to what is "implicit in the concept of ordered liberty," is a policy decision and belongs to the people who make their will known through their elected representatives. By disregarding this constitutional mandate, the Supreme Court has acted against the Constitution, oblivious to the fact that every judicial officer is solemnly committed by oath pursuant to Art. VI, clause 3, "to support this Constitution," that is the Constitution as written and intended by the framers and as legally amended.

In 1963, the Supreme Court must have sensed the impropriety of its action when it said in Percuson v. Florida, 372 U.S. 726, 730 (1963):

"We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws ... and this Court does not sit to "subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure." (Citations omitted).

Regrettably, the Court has not extended this insight to the religion clause. At about the same time, namely in 1962 and 1963, when the Court rendered Engel v. Vitale, supra, and Abington

4) Griswold v. Connecticut, 361 U.S. 479, 511, 513 (1965). Black, J., dissenting.

Seal School District v. Schempp, supra, the Court again misused the Fourteenth Amendment to the Constitution to prevent the people in the States from making their own laws with respect to religion and substitute the Court's own beliefs.

The federal courts have no jurisdiction in suits by individuals against a State arising under the retained powers of the States.

The Constitution has granted no federal judicial power over suits by individuals against a State, or by citizens of one State against citizens of the same State, arising under the powers reserved to the States. See Const. Art. III, Sec. 2, cl. 1, and Amendment XI. The power to make laws concerning religion has never been delegated by the Constitution to the federal government and is therefore protected by the Tenth Amendment. The school prayer cases are in essence suits by individuals against a State. Over such suits ^{the} Constitution has not granted any federal judicial power, and therefore federal courts cannot legally take jurisdiction in such cases.

The Supreme Court has prevented the people in the States from exercising their right to make their own laws respecting religion.

As shown above, supra 2, 3, the only legal way to change the Constitution is by a constitutional amendment pursuant to Art. V, that is with the consent of two-thirds of Congress and of the Legislatures or Conventions of three-fourths of the States. The Constitution has given the Supreme Court no authority to change it. It follows that the Supreme Courts could not really change the Constitution by the Court's attempts to change it in the school prayer cases. But it succeeded in preventing the people in the States from exercising their constitutional right to enact their own laws in this field because, to speak with Abraham Lincoln, federal authorities, law professors and the American news media have thrown around a Supreme Court decision a degree of sacredness absolutely unknown in the Western world and also unknown to the United States Constitution.

In the famous Lincoln-Douglas debate, Douglas insisted that every pronouncement in the Supreme Court's decision in Dred Scott v. Sandford, 60 (19 How.) 393 (1956), was of generally binding effect, although the Court had declared that it had no jurisdiction in the matter. In that case, the Supreme Court had declared (1) that no Negro slave, imported as such from Africa, nor his descendants, could ever become a citizen ^{of any State} in the sense of that term as used in the Constitution of the United States; and (2) that neither Congress nor a territorial legislature can exclude slavery from any U.S. territory.

Lincoln insisted that the only thing which had to be respected was the Supreme Court's actual decision, and that was that Scott

was still a slave. He ridiculed the position taken by Douglas. He said:

"The sacredness that Judge Douglas throws around this decision is a degree of sacredness that has never been before thrown around any other decision. I have never heard of such a thing." 5/

Today, that is being done by those who insist that a Supreme Court decision interpreting or pretending to interpret a constitutional provision takes the place of the constitutional provision itself and can be changed by the representatives of the people in the State and Federal Legislatures only by a constitutional Amendment pursuant to Article V of the Constitution. The practical effect has been to prevent the people from making their own laws with respect to religion because such a Supreme Court decision has been given the force and effect of a constitutional provision.

Under the Constitution, a Supreme Court decision
has no generally binding effect.-----

Such a position is incompatible (1) with the language of the Constitution and (2) with the intent of its framers.

(1) The very first article says without any possibility of misunderstanding: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." (Emphasis added). Nowhere in the Constitution is a Supreme Court decision given the status of a "law of the United States," nor does the Constitution anywhere provide that a Supreme Court decision interpreting a constitutional provision should take the place of the constitutional provision itself.

(2) The language of the Constitution reflects the intent of its framers, as it appears from Madison's notes which he made at the Federal Convention of 1787 where the Constitution was drafted. An earlier draft had given the Supreme Court jurisdiction over "all cases arising under laws passed by the Legislature of the United States." Dr. Johnson of Connecticut moved that the jurisdiction be extended "to all cases arising under this Constitution." Madison doubted "whether it was not going too far to extend the jurisdiction of the Court generally to cases arising under the Constitution." But then he agreed after it was generally understood "that the jurisdiction given was limited to cases of a Judiciary nature." Madison emphasized that "the right of expounding the Constitution in cases not of this nature ought not to be given to that Department." 2 Farrand 430. This was understood to mean that the federal courts, including the Supreme Court, would have jurisdiction to interpret constitutional questions in a case or contro-

5) Created Equal? The complete Lincoln-Douglas Debates, ed. and with an introduction by Paul M. Angle, 36-37 (Chicago 1958).

versary brought before them, but that such interpretation would bind only the parties properly before the courts.⁶⁾

The dangers of S.J.Res. 199.

S.J.Res.199, if adopted as part of the Constitution, is apt to have an effect opposite to that which was intended.

The first sentence, standing alone, could be considered of the same nature as the first ten amendments which, as the Senate explained in its preamble thereto, were "declaratory and restrictive clauses" which had been added to the Constitution upon the desire expressed by the conventions of a number of the States at the time of adopting the Constitution, "in order to prevent misconstruction or abuse of its powers."⁷⁾

But the last sentence of S.J.Res.199 is a trap which would catch the States again in the net of Supreme Court jurisdiction, except that the Supreme Court could do then legally what it is doing now only by usurpation, because a claim that school prayers are not voluntary would allege a real violation of a constitutional provision, namely the provision that no person shall be required to participate in prayers. A claim that school prayers are not voluntary would then not be a claim arising under the retained rights of the States, but a claim arising under the Constitution over which federal courts can rightfully take jurisdiction pursuant to Article III of the Constitution. If this amendment proposal is adopted as drafted, the people might soon find themselves in the same predicament as they are today. The Supreme Court will be able to destroy school prayers by an "interpretation" of "required" participation as surely as it does today by its insistence of separation of state and church, a requirement which is nowhere in the Constitution.

The best way to re-establish constitutional conditions under the existing Constitution

It must never be forgotten that it is the Supreme Court that has succeeded in suppressing school prayers by an "interpretation" of the First Amendment's religion clause and the Fourteenth Amendment's due process clause which has no basis in the real Constitution. There is no assurance that the Supreme Court will change its ways, until Congress is willing to use the ~~executive~~ power which has been given to Congress by the Constitution for the purpose to check possible usurpations of the Supreme Court. See Hamilton in The Federalist Papers, No.80 at 481, No.81 at 488 and 491. It is, of course, the power of Congress over the appellate jurisdiction of the Supreme Court. There is no doubt that that power is plenary.

6) To George Bancroft, history of the formation of the Constitution of the United States of America 198 (New York 1882).

7) Journal of the first session of the Senate of the United States of America, Appendix 96 (1789).

The Supreme Court itself has admitted this when it urged Congress by letter of June 22, 1978, to relieve it of its mandatory appellate jurisdiction. (Printed as App.1 to Senate Rep.No.96-35, to accompany S.450). But the most authoritative testimony came from the maker of the clause in Art.III, that the Supreme Court shall have appellate jurisdiction "with such Exceptions, and under such Regulations as the Congress shall make," namely Chief Justice Ellsworth in Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321, 327 (1796), where he said: "If Congress has provided no rule to regulate our proceedings, we cannot exercise our appellate jurisdiction; and if the rule is provided, we cannot depart from it." Similarly, the Supreme Court said in Carroll v. United States, 354 U.S.394, 399 (1957), that the existence of appellate jurisdiction "is dependent upon authority expressly conferred by statute."

However, the only question for Congress is the question who under the Constitution is entitled to make laws respecting religion. As shown above, only the States have that right. Therefore Congress cannot tell the States what laws they should make as, for instance, whether prayers should be voluntary. But Congress need not worry. The school prayers which the Supreme Court suppressed were all voluntary prayers. The constitutions of the States have guaranteed freedom of religious worship from the very beginning of their existence. The word "voluntary" in a law to prevent federal courts from taking jurisdiction in cases relating to school prayers would only bring the federal courts back, because they could rightly say that Congress had not prevented them from taking jurisdiction in cases where the issue of voluntariness is raised, and that will happen in every case where a prayer is said in a class room of a public school.

A law to prevent the federal courts from taking jurisdiction in cases relating to religion would be a first step to relieve the Supreme Court of its heavy case load about which the judges have been complaining. No doubt, a large part, if not the largest part, of the Supreme Court's mandatory case load is due to the Court's usurpations of jurisdiction over the retained right of the States. Acts of Congress to prevent the federal courts from taking jurisdiction in cases relating to prayers, schools, abortion and many other matters belonging rightfully to the retained rights of the States would be the cheapest way of relieving the Supreme Court of its heavy case load of appeals, permit it to devote adequate attention to cases properly within its jurisdiction and, most important for the Nation, re-establish constitutional conditions.

Every member of Congress is solemnly committed by oath or affirmation pursuant to Article VI, clause 3, of the Constitution to support this Constitution, that is the Constitution as written and intended and as legally amended. No one has sworn an oath to support a decision of the Supreme Court.

Summary and Conclusion.

From the foregoing, it appears that the power to make laws respecting religion has never been delegated to the United States by the Constitution of the United States. Therefore that power, which includes the power to provide for prayers in the States' public schools, is part of the powers reserved to the States and protected by the Tenth Amendment.

The United States Supreme Court has made it practically impossible for the States to have prayers in their public schools by assuming jurisdiction over cases over which the Constitution has granted no federal judicial power, and by attempting to change the Constitution in the guise of constitutional interpretation.

S.J.Res.199, the proposed constitutional amendment, would for the first time place into the Constitution an indirect admission that a Supreme Court decision interpreting or preterding to interpret a constitutional provision takes the place of the constitutional provision itself, which can be changed by the people only by a constitutional amendment pursuant to Article V of the Constitution. It would, in other words, recognize that the Supreme Court can change the Constitution in the guise of interpretation. This would ~~create~~ create an irreconcilable conflict with Article V of the Constitution which provides that the Constitution can be changed only by persons elected by and responsible to the people.

Furthermore, the second sentence of S.J.Res.199 would create a new constitutional right, namely a right not to be required to participate in prayer. Under the constitutions of the States, no one can be required to participate in prayer, because these constitutions, without exceptions, guarantee freedom of religious worship. To transfer, what is now a retained right of the States, into the U.S.Constitution, ~~This~~ would permit the Supreme Court to place its own interpretation on what "required" means and would prevent the States from making their own laws.

The State of Alabama wishes to be able to exercise its retained right to make its own laws respecting religion, as guaranteed by the Tenth Amendment of the U.S.Constitution. What is needed is not a constitutional amendment, but merely an act of Congress to prevent the Supreme Court from taking jurisdiction in matters relating to religion, especially to school prayers. The Constitution has given Congress complete authority to enact such a law.

PREPARED STATEMENT OF JAMES M. SMART, JR.

Mr. Chairman and Members of the Committee:

It is my privilege to appear before this committee to discuss S.J. Ses. 199, the "School Prayer Amendment." I come to you as an attorney with experience in litigation related to the First Amendment's "Establishment Clause" and the "freedom clauses" of that amendment.¹ I have also been a student of religious freedom and constitutional law because of my personal views on the importance of religious freedom.

I will suggest a perspective on these issues about which this committee can form a consensus, and about which, I believe, the committee can take some practical and constructive action, thereby providing solid leadership for the entire Congress on a very difficult and sensitive issue.

I. THERE IS A SIGNIFICANT PROBLEM

The President and the Senators sponsoring this proposal surely feel that court decisions and administrative actions of school officials in the past twenty years have resulted in a severe decline in national respect for the values which religion has tended to support. Many people believe that passage of this amendment would help to advance respect for authority in school children, and would tend to aid the development of a stronger national consensus on the value of traditional morality. While I am in great sympathy with these motives, I also feel it is most urgent to consider whether or not this amendment would really address the most significant problem.

The 1962 and 1963 Supreme Court cases dealing with school-sponsored religious activities,² which this amendment seeks to overturn, have been the cause of much misunderstanding and misapplication. These cases have, unfortunately, been construed by lower courts, school attorneys, and administrators, in such a way as to cause the State, in some cases, to assume a role of opposition and hostility to religion and religious exercise.

The Religion Clauses of the First Amendment³ were set as dual sentinels to safeguard the concepts of "private voluntarism" and "governmental neutrality"⁴ in matters of religion. Thus, where lawyers and courts construe these clauses in such fashion as to frustrate both concepts (voluntarism and neutrality), a serious constitutional problem exists. The Supreme Court decisions on school prayer, properly understood and limited, never took us that far.⁵ Instead, it is the lower court decisions since 1962 that have departed from the philosophical underpinnings of the First Amendment. Documented examples of what I am talking about are set out in the appendix.

The subtle message of these decisions, communicated all across America, is that religious freedom is less worthy of protection than other freedoms. Opponents of religious freedom are fond of stating that one should engage in his religion at home, or in church or synagogue. That is certainly true, but it misleads if it is used to justify discriminatory restrictions against religious views and activities where other views and activities are accommodated.

The Supreme Court's 8-1 decision in Widmar v. Vincent⁶ in December, 1981, certainly went some distance in clearing up this confusion, striking down the regulation of the University of Missouri prohibiting student groups from engaging in "religious teaching" or "religious worship" on campus, where students were allowed to pursue every other special interest without restriction. The Court clearly announced the principle that the government has a duty to protect and accommodate the religious speech of individuals to the same extent as it affords protection and accommodation to speech on other subjects.

Shortly after announcing the decision in *Widmar*, however, the Court refused to hear the appeal of the "Students For Voluntary Prayer" in *Brandon v. Board of Education*,⁷ involving similar issues at the high school level. In view of the Supreme Court's reluctance to deal with this issue with regard to public elementary and secondary schools, lower courts simply assume the safest route is to rule against groups asserting any such right for students.⁸ This only deepens the misunderstanding. If this committee waits for the Supreme Court to resolve this problem, many personal rights and liberties may be abridged while the Congress sits idly by.

II. THE PROPOSED PRAYER AMENDMENT

The prayer amendment, according to the Administration, is intended to overrule the Supreme Court decisions relating to school prayer, and to allow school districts and state boards of education to prescribe prayers in which students can participate. The amendment does not force states to sponsor prayers or prayer times, but appears to allow states a free hand in doing so. It therefore purports to authorize more governmental religious activity than is necessary to correct the restriction on student rights described above. Since it deals only with prayer and not with other religious activities, it falls short of protecting the rights of students to engage in other religious activities, such as discussing religion or reading religious materials.

If the proposed amendment,⁹ on the other hand, were worded so as to protect student-initiated prayer, and were further worded so as to protect other types of self-initiated religious activities as well (by requiring schools to accommodate such activities to the same extent that it accommodates other voluntary student activities), it would serve to correct the existing problem without going so far as to authorize school authorities to prescribe and control prayer activities.

Such a proposal would appeal to the conservative (who laments the discrimination against voluntary religious activities because of the negative impact on traditional values), and would further appeal to many liberals (who would recognize that the proposal would address personal freedom of religion, not governmentally sponsored religious activities).

III. AMENDMENT OR LEGISLATION?

One way to accomplish the objective discussed, without fear of running into the constitutional challenge in the courts, is to propose and enact an amendment to the Constitution. Whether or not ratification would be a lengthy process is not at all clear, although I suggest that an amendment as suggested above would be far less divisive than the language originally proposed and, when properly understood, would more easily secure a consensus of support. An example of language that would seem adequate for such purpose is as follows:

Nothing in this Constitution shall be construed to prohibit prayer or other religious activity in public schools. Neither the United States nor any State shall require any person to participate in prayer or other religious activity, nor shall any such government influence the form or content of any prayer or other religious activity.¹⁰

While this language does not authorize the State or the classroom teacher to compose the prayer, it allows the students to compose and recite their own prayers. It would allow the teacher to use classroom time at the beginning of each day for a voluntary prayer time. Students volunteering to lead

the class in prayer could do so, or the teacher could simply set aside time for a moment of silent prayer.

An alternative measure, or companion measure, which this committee should consider is congressional legislation to deal with the improper restrictions on the rights of students to engage in voluntary religious activities. An example of such legislation, which I favor, is that proposed by the Christian Legal Society:

No public secondary school receiving federal financial assistance, which generally allows groups of students to meet during non-instructional periods shall discriminate against any meeting of students on the basis of the religious content of the speech at the meeting, provided that the meeting shall be voluntary and orderly and that no activity which is in and of itself unlawful need be permitted.¹¹

By concentrating on treating self-initiated religious activities the same as other self-initiated activities, the concepts of private voluntarism and government neutrality are preserved. If properly implemented, such legislation should survive constitutional challenge.¹² Such a statute would not supplant the proposed amendment, but would supplement the amendment, and enhance the cause of the amendment in several ways. First, Congressional support of a bill extending the *Widmar* principle to public secondary schools would demonstrate the resolve of Congress to deal with the loss of voluntary religious activity from public schools. Second, while an amendment would take at least several years to enact, a statute could correct relatively quickly the most recent and perhaps the most extreme of the judicial distortions at which the amendment is aimed. Third, such a bill, within its sphere of impact, could make an affirmative requirement of neutrality, rather than just removing the federal Constitution as the asserted reason for discrimination against religious activity.¹³ Finally, a statute extending this freedom to public schools focuses attention on those violations of freedom of speech and association that are most offensive to the overwhelming majority of American people.

IV. CONCLUSION

I support the concept of a truly voluntary prayer amendment. I suggest, however, that this committee can provide constructive leadership by proposing certain changes in the Administration's amendment to make it more effective in dealing with the most urgent problem, and by sponsoring legislation capable of dealing with the problem while still representing the consensus of the American people. I am less concerned about the right of a teacher to lead a class in prayer¹⁴ than I am about the right of the students to engage in truly voluntary, self-initiated religious activities. The rights of students are now being denied.

Congressional hearings on legislation such as that suggested could, I would assume, be consolidated with hearings on the prayer amendment. I urge this committee to act as decisively as possible. As this committee deliberates, precious freedoms of speech, association, and religion are being restricted as a result of a faulty apprehension of the meaning of the "Religion Clauses" of the First Amendment.

Thank you for your consideration of these thoughts. Any questions which any committee member may have are welcome.

FOOTNOTES

1. The witness was lead counsel for the student group in *Widmar v. Vincent*, U.S. 102 S.Ct. 269 (1981), the decision establishing that public university students are entitled to engage in voluntary religious activities on campus.
2. *Engel v. Vitale*, 370 U.S. 421 (1962); *Abington School District v. Schempp*, 374 U.S. 203 (1963).
3. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."
4. These concepts are derived from the concurring opinion of Justice Harlan in *Walz v. Tax Commission*, 397 U.S. 664 (1969). See also *Abington School District v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring). "Private voluntarism" as used in this paper is nothing more than individual freedom of choice in matters of religion. We are talking about the freedom of choice of private individuals, not governmental entities. The government's duty is one of neutrality and benevolent tolerance toward religion and religious exercise. These two concepts -- private voluntarism and governmental neutrality -- state the essence of the principles underlying the First Amendment Religion Clauses. If the Establishment Clause had been intended to restrict individual liberties, it would seem strange to have included it in the "Bill of Rights." History well reflects that the "neutrality" concept was intended by the framers as primarily a neutrality between different religions -- it was never intended to be a "cold shoulder" to religion in general. See Kurland, *The Supreme Court, Compulsory Education, and The First Amendment's Religion Clauses*, 75 *West Virginia Law Review* 213; Corwin, *The Supreme Court as National School Board*, 14 *Law and Contemp. Prob.* 3; Schwarz, *No Imposition of Religion, The Establishment Clause Value*, 77 *Yale L.J.* 692; T. Cooley, *Principles of Constitutional Law* (1890). Therefore, if we remain true to history, we must recognize that the drafters of the First Amendment never sought to discourage religion in any way, but rather to provide a benevolent accommodation for religious exercise, while carefully safeguarding against allowing a particular denomination to gain control of the government.
5. *Engel* (*supra*) and *Schempp* (*supra*) struck down religious activities which were promoted and sponsored by the schools. These cases never dealt with self-initiated, voluntary, student religious activities.
6. 102 S.Ct. 269 (1981).
7. 635 F.2d 971, 977-79 (2d Cir. 1980), cert. denied, 102 S.Ct. 970 (1981).
8. For example, see the case of *Lubbock Civil Liberties Union v. Lubbock Independent School District*, 669 F.2d 1083 (5th Cir. 1982), described in the appendix. Courts could still construe the provision of the state constitution to be religious activities on school property. All the amendment does is to remove the Establishment Clause as a justification for restricting religious activities.
9. The text of the proposed amendment: "Nothing in this Constitution shall be construed to prohibit individuals or group prayer in public schools or other public institutions. No person shall be required by the United States or by any State to participate in prayer."
10. This language is almost identical to the proposal made by Robert P. Dugan, Jr., in his testimony on July 29, 1982, speaking in behalf of the National Association of Evangelicals. The concepts of the two proposals are identical. According to information at my disposal, Dean Kelley of the National Council of Churches indicated in his testimony on July 29, that he also would support this type

of an amendment, while opposing the language of the original proposal. Certainly there are others who oppose the present proposal but would be sympathetic to a reworded proposal as suggested above. I have removed the words "or other public institutions" from the amendment because I feel there is presently little need for the amendment to extend beyond schools. Further, there is the possibility that the restriction upon the government could be construed so as to prohibit chaplains in legislatures or other public places from serving as they do presently.

11. The Christian Legal Society, of which I am a member, also suggests an alternative proposal which removes the word "religious" from preceding the word "content", making the proposal more of a free speech bill generally. I personally prefer to limit the reach of the bill, leaving to secondary school administrators some remaining discretion (whatever the courts will leave them) with regard to excluding certain activities and viewpoints from the school grounds.

The following observations are submitted as to this proposed legislation:

1. The legislation is restricted to secondary schools.
 2. It would apply only to those schools receiving federal financial assistance.
 3. It applies to schools that "generally" allow student meetings, thereby conforming to the language of the Supreme Court in Widmar.
 4. It is limited to the rights of students, and does not address itself to the rights of faculty, staff, or outsiders.
12. The Fourteenth Amendment's due process and equal protection clauses incorporate several individual constitutional rights as binding on the states, including the freedom of speech, Fiske v. Kansas, 274 U.S. 380 (1927), freedom of assembly, DeJonge v. Oregon, 299 U.S. 353 (1937), and free exercise of religion, Cantwell v. Connecticut, 310 U.S. 296 (1940). Section Five of the Fourteenth Amendment provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Therefore Congress has general authority to enact legislation requiring states to respect such constitutional rights. In addition, of course, Congress has power to attach conditions to grant programs, as long as those conditions are themselves constitutional. E.g. Fullilove v. Klutznick, 448 U.S. 448 (1980).
 13. It is conceivable that a state or federal court opposed to permitting such religious activities could construe a provision of the state constitution to forbid the accommodation of religious activities. The amendment would not preclude such a result, since the amendment seeks primarily to correct the erroneous assertion that the federal constitution requires discrimination against religious activity.
 14. While I find Justice Stewart's dissent in Engel and Schempp to be compelling and appropriate, I nevertheless feel that the unfortunate results from the "school prayer cases" can be minimized, and am therefore less concerned about directly overturning these decisions. My primary concern is with personal freedom in matters of religion.

ENCLOSURE.

APPENDIX

Testimony of James M. Smart, Jr.

1. The A.C.L.U. has sued three school districts in Pennsylvania complaining about, among other things, that two of the school districts allow religious clubs. The school districts decided to settle the case by agreeing to disband the student religious clubs.

2. In Williamsport, Pennsylvania, a student group applied to the local school board for permission to start a club called "Petros", which planned to hold religious meetings before school, after school, or during a school club period. The school board refused the request, forcing the students to file suit in federal district court to seek protection of their rights of freedom of speech and freedom of assembly. This case is now pending.

3. In Anderson, South Carolina a public high school opens its doors one-half hour early each day for peaceable student meetings in vacant rooms. For some time, a group of students has used this opportunity for voluntary meetings to pursue Bible study, prayer, and worship. Recently, the local representative of the American Civil Liberties Union has publicly threatened to file suit against the local school board to require it to police the content of student speech by banning any meetings with religious content.

4. For several years prior to the 1980-81 school year, students at North Allegheny High School in Pittsburgh, Pennsylvania, had met on school grounds to study the Bible and pray. The meetings occurred during a twenty-five minute period of time after the arrival of school buses and before the beginning of homeroom period. When this practice was brought under question, high school administrators and then the superintendent of the school district denied a formal request made by the students to use a classroom before school hours began.

5. In Dixon, Illinois (the hometown of President Reagan), a local school board has voted to ban all voluntary religious activities of students on school grounds. Also, the same school board will allow outside community groups only four opportunities per year to rent or reserve school facilities for meetings after

school hours if these groups intend religious speech; non-religious groups enjoy after-hours access without this restriction.

6. In Brandon v. Guilderland Central School District, 635 F.2d 971 (2d Cir. 1980), cert. denied, 102 S. Ct. 970 (1981), the United States Court of Appeals for the Second Circuit upheld the decision of the Guilderland Board of Education to ban voluntary, student-initiated religious meetings from school property during, before, and after school hours with language implying that no religious activity whatsoever is permissible in public schools. The Second Circuit said that an "adolescent may perceive 'voluntary' school prayer in a different light if he were to see the captain of the school's football team, the student body president, or the leading actress in a dramatic production participating in communal prayer meetings in the 'captive audience' setting of a school." 635 F.2d at 978. This language would logically lead school officials to prevent students from bowing their heads to say a prayer before lunch, carrying their Bible to school, or doing any other overt religious act of free exercise of religion within the boundaries of the school. The Supreme Court declined to review this decision in December, 1981, shortly after deciding Widmar.

7. In Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F.2d 1308 (5th Cir. 1982), the United States Court of Appeals for the Fifth Circuit went even farther than the Second Circuit did in Brandon, by forcing a total ban of voluntary, student-initiated religious activity in a school district that wanted to accommodate the free exercise of religion and freedom of speech rights of public school students. The Fifth Circuit upset a carefully drafted school board policy, adopted after public deliberation, which purported only to treat all student-initiated groups equally with regard to access to school facilities for meetings before and after school.

8. In Johnson v. Huntington Beach Union High School District, 68 Cal. App. 3d 1, 137 Cal. Rptr. 43, cert. denied, 434 U.S. 877 (1977) (certiorari denied on technical grounds not related to the merits), the California Court of Appeals held that student Bible clubs could not meet in public school facilities during the non-curricular periods of the school day, because to accommodate any such meetings would violate the Establishment Clause.

PREPARED STATEMENT OF GROVER REES

Mr. Chairman and members of the Committee:

I am here to testify in support of S.J. Res. 199, a resolution proposing an amendment to the United Constitution restore the right to voluntary prayer in public schools.

I have no particular qualifications to speak to the question whether school prayer is desirable. Indeed, I think it is important to emphasize that this amendment would not require that a single prayer ever be said by anyone in any school. It would simply provide that the decision be made by state and local education authorities --- subject to the rights of individual conscience --- rather than by the federal courts. As someone whose job it is to read and write about constitutional law and therefore about the federal courts, I think this transfer of decisionmaking power would be a good thing.

I also think it is important to observe what kind of a constitutional amendment we are talking about. This proposal would make no change at all in the Constitution as it was understood by those who framed and ratified it. Rather, it would have the effect of reversing certain decisions of the United States Supreme Court, decisions that seem to have been based on the Justices' ideas about what was right for the country rather than on their construction of what the Constitution and its amendments meant to those who framed them.

The original understanding of the First Amendment was not that government could have nothing to do with religion. Rather, the Establishment Clause was intended to prohibit the federal government from establishing a

national religion. This did not mean that prayer could not be a part of public life, and it imposed no restrictions whatever on state and local governments. The First Congress of the United States, the day after proposing the First Amendment, passed a resolution requesting that President Washington proclaim a day of national prayer and thanksgiving.¹ That Congress also reenacted the Northwest Ordinance, providing in part for public schools which were to advance "religion, morality, and knowledge."² Although Thomas Jefferson strongly opposed the establishment of religion in his own state of Virginia --- and it important not to confuse the views of individual framers on controversies within their own states with the intentions of all of them concerning what powers, if any, the federal constitution was to take away from the states³ --- Jefferson also wrote that he doubted whether "the liberties of a nation" could "be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God."⁴ Jefferson's idea of what neutrality toward religion meant was perhaps best reflected in his plan to establish several seminaries at the University of Virginia, one for each of the several leading denominations in the state.⁵

The Supreme Court has held that the Fourteenth Amendment was intended to "incorporate" the Establishment Clause and make its prohibitions binding not only on the federal government but also on the states.⁶ Constitutional historians, however, have generally been skeptical of the claim that the framers of the Fourteenth Amendment had any intention to "incorporate"

the specific provisions of the Bill of Rights.⁷ The case against incorporation of the Establishment Clause is particularly weak, since one of the purposes of that clause was almost certainly to prevent the federal government from interfering with the power of states to establish their own churches if they so desired.⁸ How do you "incorporate" a states' rights provision and make it "binding" on the states?

Perhaps the most powerful piece of evidence against the proposition that those who framed and ratified the Fourteenth Amendment intended thereby to take away the power of state and local governments to provide for school prayer is the debate over the Blaine Amendment in 1876. This was a proposed constitutional amendment to prohibit the states from establishing religion or abridging the free exercise thereof.⁹ Its proponents clearly did not believe that the Fourteenth Amendment already prevented the states from doing these things, and its opponents said they thought the matters should be left to state discretion.¹⁰ This was eight years after the ratification of the Fourteenth Amendment. Many of those who were in Congress in 1876 had been in the Congress that proposed the Fourteenth Amendment.¹¹ Yet nobody suggested that the Blaine Amendment was superfluous because the Fourteenth Amendment already imposed its prohibitions on the states. Everyone assumed the states had the power to establish religion outright if they wanted to. And even the proponents of the Blaine Amendment --- those who wanted to abolish state power to establish religion --- explicitly provided that their amendment would not prevent Bible reading in the public schools.¹²

At the time of the school prayer cases in the early 1960s, the Blaine Amendment was cited as evidence that the Fourteenth Amendment did not make the Establishment Clause binding on the states, and that even if it did, the clause did not prohibit school prayer.¹³ In *Abington Township v. Schempp* the Court rejected these arguments, making it clear that the original understanding was not as important to the Justices as their own recent precedents and their own views about the needs of modern society. Writing for the majority, Justice Clark observed that some people

continue to question (the) history, logic and efficacy (of the Court's holdings that the Establishment Clause applies to the states and requires neutrality between religion and nonreligion.) Such contentions, in the light of the consistent interpretation in cases of this Court, seem entirely untenable and of value only as academic exercises.¹⁴

Justice Brennan, concurring, was even more explicit in rejecting arguments that the Court was bound by the intentions of those who proposed and ratified the provisions the Court claimed to be interpreting:

Even if we assume that the draftsmen of the Fourteenth Amendment saw no immediate connection between its protections and the guarantees of the First Amendment, it is certainly too late in the day to suggest that their assumed inattention to the question dilutes the force of these constitutional guarantees in their application to the states. It is enough to conclude that the religious liberty embodied in the Fourteenth Amendment would not be viable if the Constitution were interpreted to forbid only establishments ordained by Congress.¹⁵

Justice Brennan was being somewhat disingenuous, for he was dealing not with evidence of "inattention" to a relationship between the Fourteenth Amendment and the Establishment Clause, but to evidence of an affirmative contemporaneous understanding that the amendment did

not make the clause binding on the states. But he made it clear that the Justices' apprehension of the Zeitgeist, and not of the meaning attached to words by those who wrote and adopted them, was the basis of the school prayer opinions.

Among those who work in constitutional law it is considered naive to talk about the intentions of the framers. It is said that we cannot know what they intended, and that we might not want to know, so that the best the courts can do in "interpreting" the constitution is to divine and enforce the values that are important to Americans today.¹⁶ For some of us at least, this attitude seems contrary to the whole rationale for recognizing the Supreme Court as the supreme interpreter of the Constitution. As articulated by Chief Justice John Marshall in Marbury v. Madison,¹⁷ the doctrine of judicial review was grounded in the decision by the sovereign people to adopt a written constitution imposing restrictions on their legislature. That constitution, said Marshall, is supreme law. If a court is presented with a statute that conflicts with the meaning of the written constitution that was adopted by the people, then it is his duty (not just his power) to declare the law unconstitutional. But if it is impossible to tell what the Constitution really means, and if the Court is enforcing those policies and values that the Justices regard as fundamental, then there is no reason that their judgment should be superior to the judgment of Congress or of the state legislators. When the Court unfetters itself from the historical Constitution, it also unfetters the rest of us.

Yet, because the Court enforces its policies under the rubric of enforcing the Constitution, a constitutional amendment is the only effective way to reverse a Supreme Court opinion. When an amendment is proposed that would chip away at a piece of the twentieth-century judicial constitution and restore the original understanding, it strains the limits of honest advocacy to accuse supporters of the amendment of being radicals who are cluttering up our fundamental document with their particular causes and ideologies. Yet that has been the response to the school prayer amendment from many of its opponents, including some teachers of constitutional law. They keep two sets of books: Among the cognoscenti, judicial review is justified as a way of imposing on legislatures fundamental contemporary values that the legislatures stubbornly refuse to recognize.¹⁸ But when the public becomes unhappy with a Supreme Court decision, we hear about the framers and the sanctity of the fundamental document. Yet the amending process --- unlike the power of the judges to impose their own values on the public --- is part of that document. Rhetoric about not cluttering up our fundamental document should be directed at the courts, not at those who seize the only available means of erasing judicial glosses on the original understanding. Constitutional scholars should remember that many Americans value the Constitution not simply for the sake of having one, but for what it says.

Finally, I would like to address myself briefly to some of the horror stories that have been told by opponents of the school prayer amendment. They speak as if it would force people to participate in prayer,

yet the amendment explicitly provides that no such requirement can be imposed. Any person who for any reason objects to any prayer will have the right not to participate. The trick is that the definition of "coercion" has been expanded to include subliminal pressure to conform. This is a problem inherent not in the nature of prayer but in the nature of public education. Schools teach values as well as information: many people object to the particular things that are taught to their children, but even the most vehement opponents of such things as sex education and flag salutes seek only to have their children excused from participation, or perhaps to have their school boards exclude the offending programs from the curriculum. Nobody seeks to have the courts declare these things unconstitutional.

The other objection I have heard most frequently is that the amendment will empower governments to write their own prayers. It is true, of course, that the amendment will restore to state and local school authorities the power they had until 1962 to choose prayers that will be said in schools --- always subject to the rights of individual students not to participate. It is also true that the power to choose a prayer might include the power to choose a prayer written by someone who is alive today. (I assume this is what is meant by "government writing prayers," since I don't imagine anyone believes the prayers will be composed on the floor of the state legislature.) I personally see no reason why school boards would want to commission new prayers; there are lots of perfectly good prayers that have been around for hundreds or thousands of years. But it is true that the amendment would allow this. The only response

to those who object to this feature of the amendment is to ask what they would prefer; after all, somebody has to choose the content of any group prayer, or of any other group exercise. The two alternatives I can think of are to write a particular prayer into the Constitution, or to include a provision in the Constitution restricting the kinds of prayers that can be said. In either case, the government is still going to wind up choosing prayers; it is just that the power of choice will reside (as the power of prohibition now resides) in the federal courts rather than in state and local school authorities.

This is the answer to most of the horror stories: The power to do something invariably includes possible abuses of the power. To those who are convinced that state and local school authorities will abuse the power to provide for school prayer, I can only say that I trust the school boards more than I trust the federal courts. In applying their rule against prayer, the federal courts have forbidden not only "denominational" prayer, but also Bible reading,¹⁹ student-initiated prayers in meetings after classes in school buildings,²⁰ posting of the Ten Commandments on classroom walls,²¹ and school policies permitting students "to gather at the school . . . for any educational, moral, religious or ethical purposes."²² One court even upheld a school principal's decision to deny kindergarten children the right to say grace before lunch --- a decision based on the possibility that other children might have felt pressure to say grace, and that this would have been an establishment of religion within the courts' expansive definition.²³ We should trust our

courts less and our communities more. The school prayer amendment will restore the decisionmaking power to the communities, where the framers of the Constitution intended it to reside.

FOOTNOTES

1. 1 Annals of Congress 914 (1789).
2. Act of Aug. 7, 1789, 1 Stat. 50, 51-52, n.(a).
3. See Engel v. Vitale, 370 U.S. 421, 445-56 (1962) (Stewart, J., dissenting).
4. 4 Works of Thomas Jefferson 803 (Putnam, New York, 1904-05).
5. 2 P. Bruce, History of the University of Virginia 367-69 (1920).
6. Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203 (1948).
7. See, e.g., Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 Stan. L. Rev. 5 (1949); Morrison, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation, 2 Stan. L. Rev. 140 (1949).
8. See Abington Township v. Schempp, 374 U.S. 203, 309-10 (Stewart, J., dissenting); Snee, Religious Disestablishment and the Fourteenth Amendment, 1954 Wash. U.L.Q. 371.
9. H. Res. 1, 44th Cong., 1st Sess. (1876), quoted in Illinois ex rel. McCollum v. Board of Education, 334 U.S. 203, 219 n.6 (Frankfurter, J., concurring).
10. See Meyer, The Blaine Amendment and the Bill of Rights, 64 Harv. L. Rev. 939 (1951).
11. See id. at 941 n.14.
12. See H. Res. 1, supra note 9: "This article shall not be construed to prohibit the reading of the Bible in any school or institution;"

13. See Abington Township v. Schempp, 374 U.S. 203, 257-58 & n.21 (1963) (Brennan, J., concurring).
14. Id. at 217 (majority opinion).
15. Id. at 257-58 (Brennan, J., dissenting).
16. See, e.g., Sandalow, Constitutional Interpretation, 79 Mich. L. Rev. 1033 (1981).
17. 1 Cranch 137 (1803).
18. See, e.g., Sandalow, supra note 16; Wellington, Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication, 83 Yale L.J. 221 (1973).
See generally J. Ely, Democracy and Distrust 43-67 (1979).
19. Abington Township v. Schempp, 374 U.S. 203 (1963).
20. Brandon v. Board of Education of Guilderland Central School District, 635 F.2d 971 (2d Cir. 1980) (public school need not allow a student group to meet after school for voluntary prayers on the same terms as other student groups are allowed to meet, since such meetings by the student prayer group would violate the Establishment Clause); Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F.2d 1038 (5th Cir. 1982).
21. Stone v. Graham, 441 U.S. 39 (1980).
22. Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F.2d 1038 (5th Cir. 1982).
23. Stein v. Oshinsky, 348 F.2d 999 (2d Cir. 1965). Although the court was not forced to decide whether the student-initiated prayers violated the Establishment Clause, it was on this basis that the principal had forbidden the prayers, and the court regarded the argument that to permit such prayers would violate the Establishment Clause as a serious one.
Id. at 1001.

EDITOR'S NOTE.--The article, "Defending the School Prayer Amendment," by Mr. Rees, appearing in The Wall Street Journal, July 22, 1982, was submitted by Gary L. Jarmin for the record in the hearing of July 29, 1982.

Senator SPECTER. I would like to call now the second panel. Dean Terrance Sandalow, Prof. Geoffrey Stone, Dean Norman Redlich, Prof. Paul Bender, and Prof. William Van Alstyne.

I do not know how the order was selected among this distinguished panel, so out of deference to the written word, I elect to proceed as they appear before me. So we shall hear first from Dean Sandalow.

STATEMENTS OF DEAN TERRANCE SANDALOW, UNIVERSITY OF MICHIGAN LAW SCHOOL, ANN ARBOR, MICH.; PROF. GEOFFREY R. STONE, UNIVERSITY OF CHICAGO LAW SCHOOL, CHICAGO, ILL.; DEAN NORMAN REDLICH, NEW YORK UNIVERSITY SCHOOL OF LAW, NEW YORK, N.Y.; PROF. PAUL BENDER, UNIVERSITY OF PENNSYLVANIA LAW SCHOOL, PHILADELPHIA, PA.; AND PROF. WILLIAM W. VAN ALSTYNE, DUKE UNIVERSITY OF LAW, DURHAM, N.C.

Mr. SANDALOW. Thank you, Mr. Chairman.

I want to begin by thanking the members of the committee for inviting me to testify regarding the proposed prayer amendment.

Because of the limited time available, I will confine my testimony to the most important and most controversial nature of the amendment, the abandonment of virtually all constitutional restrictions on prayer in the public schools.

Before discussing the merits of the proposed amendment, it may be useful to consider briefly the nature of the question that the Congress must decide in determining whether to adopt Senate Joint Resolution 199. Proponents of the amendment often seem to argue, if only obliquely, that a constitutional amendment overturning *Engle* and related decisions is justified, because those decisions rest upon what are asserted to be erroneous interpretations of the 1st and 14th amendments.

An examination of the question whether the courts did err in those decisions would carry us very far into constitutional theory, and is unnecessary, and in my judgment, very likely irrelevant to the issue that the Congress must now decide.

Our constitutional tradition does not impose upon Congress responsibility for reviewing the courts' constitutional decisions, and proposing an amendment whenever it concludes that the courts have erred.

Neither the processes nor the resources of Congress are adequate to that task. The question that Congress must decide, to put the point somewhat differently, is not a question of law, but a question of policy, whether the welfare of the Nation would be served by removing from the Constitution all restrictions upon prayer in the public schools.

President Reagan, in proposing the amendment that is contained in Joint Resolution 199, wrote, and here I quote, that it would merely "restore the simple freedom of our citizens to offer prayer in the public schools."

With deference, I submit, that the disarming simplicity of the President's characterization cloaks the real issues that the proposed amendment raises.

First, no constitutional amendment is required to restore the freedom of children to pray in school. As reported in a recent study by the Congressional Research Service, 21 States have now adopted statutes requiring or permitting schools to observe periods of silence during which students may meditate or pray.

The only courts that have considered the question has sustained the constitutionality of the practice, a conclusion that is undoubtedly consistent with the Supreme Court's decisions in *Engle* and *Schempp*.

The consequence of adopting the amendment proposed by Joint Resolution 199 would not be simply to permit prayer in public schools, for prayer in public schools is not now generally forbidden; the point is to permit it in the forms and in the circumstances in which is not now permissible.

The position of the amendment's proponents is that, so long as individuals cannot be compelled to participate, any form of prayer in the public schools should be permitted in any circumstance. In their view, the content of and circumstances for prayer in the public schools should become the subject of political discussion, or failing political decision, should be left to school officials and teachers in each of the tens of thousands of classrooms in the United States.

I hold a very different view of the matter. Under the amendment, a State might prescribe a prayer, or it might leave it to its local communities to do so. It is a truism, one that bears repeating, that Americans worship God in many ways.

If the amendment is adopted, the question that must arise in each school district, and in each State legislature, is which of the many ways should be officially prescribed. One need not suppose that the issue will be divisive in every community to recognize that it will be the subject of intense, and perhaps bitter conflict in many. Is the King James version or the Douay to be used? Shall the New Testament be avoided in deference to the beliefs of Jewish children? Shall the Bible be avoided in deference to the beliefs of the increasing number of Americans who are neither Christians nor Jews?

Differences about the place of the Bible in prayer are merely illustrative of the problem. The forms and content of prayer, for the many millions of Americans who regard it seriously, for those who would not be content with prayers addressed, as Paul Fromme once put it, to whom it may concern, are matters of vital importance, for prayer is an expression of their profoundest beliefs. Yet the beliefs that are expressed in prayer are the source of deep divisions among our people.

If I may take 30 to 60 seconds to give one illustration only that comes from testimony before this committee. Testimony, I may add, by a spokesman for a group which generally supports the amendment.

A spokesman for the National Association of Evangelicals objected to this supposedly nondenominational prayer involved in *Engle v. Vitale*, he said, and I quote, "That kind of prayer, routinely repeated every school day, is far removed from the kind of meaningful religious expression that should be permitted in the public schools."

Yet, it is apparent that prayers that are acceptable to the membership of the National Association of Evangelicals, prayers that they would regard as a "meaningful religious expression," would, if the prayer amendment were adopted, not be acceptable to many other Americans. But if the prayer amendment were to be adopted, it is not obvious what alternative the Evangelicals would have but to seek prayer that would, from their point of view, provide the opportunity for meaningful religious expression for their members.

The success of the United States in managing its unique religious pluralism——

Senator SPECTER. Are you close to being finished, Dean Sandalow?

Mr. SANDALOW. Yes, just one sentence.

Is in substantial part attributable to its having been able to avoid pitting religious groups against one another in the political arena. The pernicious effect of the proposed prayer amendment is precisely that it would invite religious groups to fight one another in the political arena about the establishment of public prayer.

Senator SPECTER. Thank you very much, Dean Sandalow.

I now would like to turn to Professor Geoffrey Stone, the University of Chicago Law School.

Mr. STONE. Thank you.

There are a number of objections one might raise to this amendment, among them are the fact that the opponents' characterization of the history is somewhat glib, and ultimately nonpersuasive. That the notion of what constitutes fair or sensible pressure upon a school child with respect to such matters is somewhat insensitive, and the claim for the necessity of the amendment is ultimately unpersuasive.

I would like to focus on one other objection, which builds upon the statement already made by Dean Sandalow, and that is that the amendment as drafted anticipates that local communities will be permitted to use not only nondenominational but especially sectarian prayer as well.

As the Supreme Court has observed, political divisions among religious lines was one of the principal evils against which the first amendment was intended to protect. The lesson of history is that competition among religious sects has occasioned considerable civil strife.

The proposed amendment, by offering government sectarian prayer in the public schools, is likely to produce precisely that kind of conflict and division along religious lines that the first amendment was designed to prevent.

The proposed amendment, by authorizing sectarian prayer, would invite disputes over the use of the Old or the New Testament, over the version of the New Testament, over the choice of text, over the unitarian or trinitarian form of address, and so on.

Moreover, the stakes in such disputes are in fact quite high. The winners receive the imprimatur of government for their faith. The losers must face the prospect that their children will encounter the cruel dilemma of either reciting a prayer that is contrary to their beliefs, or conspicuously remaining silent, or leaving the room while their classmates engage in prayer.

The practice authorized by the proposed amendment would thus inevitably intensify religious fragmentation as competing groups struggle to persuade government officials to adopt their particular view of the appropriate prayer.

Whether or not such a practice is unconstitutional, it is surely unwise.

Moreover, there is another aspect to this issue. The court has long adhered to the principle, clearly manifested in the history and logic of the establishment clause, that no State can pass laws which aid one religion, or prefer one religion over another. Even staunch opponents of *Engle* and *Schempp*, such as Prof. Charles Rice, have agreed with this basic central meaning, central command of the establishment clause.

The proposed amendment, by authorizing government-sponsored sectarian prayer directly contravenes this previously unquestioned principle of interfaced neutrality.

Suppose, for example, that the proposed amendment is enacted, and the school board thereafter authorizes the use of a prayer, referring specifically to Jesus as our Lord? A Jewish student protests. But the school authorities tell him if he does not wish to participate, he may sit quietly, occupy himself with other matters, or leave the room. The student and his parents thereafter sue, claiming that the use of this prayer, in particular, and no other prayer, violates the clearest command of the establishment clause, that government may not aid one religion, or prefer one religion over another.

Well, what in this circumstance is the court to do?

First, it might construe the amendment as authorizing only non-denominational prayer. But as explained in my written statement, and as suggested by Dean Sandalow, even an amendment so limited would pose substantial problems.

In any event, such a construction would clearly fly in the face of the framers of this particular amendment, who specifically intend to allow sectarian prayer.

Second, the court might hold that although school boards might authorize sectarian prayer, it must do so in conformity with the neutrality principles. What does that mean? Must the school board follow an equal time policy? How is equal there to be defined?

If Jews constitute 5 percent of the developing community, do the Jews get to make up the prayer 1 day out of 20? What if the Methodists disagree with the Episcopalians, and disagree with the Catholics? Should the court adopt separate but equal policy with respect to prayer?

The plain fact is that the notion of sectarian prayer is inherently irreconcilable to the principle of neutrality.

Finally, the court might treat the issue as one to be left entirely to the discretion of local school boards. This, indeed, appears to be the rather cavalier view of the administration. This view, if accepted, would render the neutrality principle negatory. It would leave the minority faiths completely at the mercy of the majority. Such a result is directly and completely inconsistent with this Nation's longstanding commitment to the religious toleration, and to religious neutrality. It should not be enacted into the Constitution.

Thank you.

Senator SPECTER. Thank you very much, Professor Stone.

I next call on Dean Norman Redlich, the New York University School of Law.

May I say, preliminarily, welcome, especially Dean Redlich, who with—we have had a long association going back to the days of the Warren Commission, a block or two away from where we sit now, and I would dwell on some of our joint conclusions, but it might undermine your credibility, as well as mine.

Welcome, Dean Redlich. I look forward to your testimony.

Mr. REDLICH. Thank you, Mr. Chairman. it is a pleasure to be here.

I will summarize my testimony very briefly.

I am appearing, not only as a student of constitutional law, but also as one who has a very deep commitment to religious faith. I am an overseer of the Jewish Theological Seminary, I am the co-chair of the Commission on Law and Social action of the American Jewish Congress.

I believe that this proposed amendment strikes at the very heart of the basic concepts of religious freedom in this country. I have been fortunate to grow up in a country where there are no preferred religions, where we are all equal before the law, where there are no prescribed religious faiths, or prescribed ceremonies that have the imprimatur of government.

It is no accident that this country alone, among countries, has the kind of commitment that we do, to separation of church and State, and is at the same time the country where religious freedom flourishes as it does nowhere else of Earth.

I do not want to be a religious stranger in this country, and I do not want my children or grandchildren to be religious strangers in this country.

Permit school boards, whether in Brooklyn or in Utah, to adopt the prayers of the majority, and have Mormon prayers in Utah, and Jewish prayers in New York, then whether they be Catholics or Protestants or Jews, in some parts of the country they will be religious strangers in their own home. There is no way that that cannot be coercive.

If the establishment clause was based on any values at all in our history, it was based on the value of neutrality, it was based on the value of no prescribed religious faith, and it was based on the value of no coercion. In those three essential respects, this proposed constitutional amendment violates some of the basic precepts of religious freedom in this country, and religious freedom, I may add, is not something that is only a religious concept, it is a political concept.

Every totalitarian government must do away with religious freedom, because religious freedom recognizes an authority that the government cannot control, that is why every totalitarian State either controls religion, subverts religion, or creates a State religion. It cannot put up with a religion that is free, and not controlled by the State.

When the founders put the religious clause first in the first amendment, it was because of a clear recognition that freedom of religion was essential to political democracy, and the establishment clause and the free exercise clause were a recognition of the essen-

tial nature of religious freedom as part of our political framework, and a recognition that the government had to remain neutral, government could not coerce, and government could not prescribe a faith.

This proposed amendment permits those things to happen.

Now, one could quarrel with individual decisions of the Supreme Court on any particular matter. I happen to think that the Supreme Court was correct in its *Engle v. Vitale*, and *Schempp* decisions, because they were faithful to the principles of the establishment clause. But I would say, even if one disagrees with particular interpretations, the worst criticism that—the worse that one could say the court is guilty of, is like Othello, that perhaps they loved religious freedom, not wisely, but too well. I happen to think they loved religious freedom both wisely and well, and an excessive concern for religious freedom, and religious neutrality is not something that the Congress should correct by constitutional amendment, it is something that we should all accept, we should all tolerate, and all be very proud of, and Mr. Chairman, I urge the rejection of this proposal.

Thank you.

Senator SPECTER. Thank you very much, Dean Redlich for that eloquent presentation.

Next is Prof. Paul Bender, also a long-standing colleague of mine, fellow Pennsylvanian, worked with me on a major project years ago when I was district attorney of Philadelphia.

Welcome, Professor Bender.

We look forward to your testimony.

Mr. BENDER. My reasons for thinking this amendment should not be added to the Constitution are very similar to those you have already heard.

The principal aim of the proposed amendment is to overrule two Supreme Court cases, the *Engel* case and the *Abington* case. The principal vice of the proposed amendment, in my view, is that it would go far beyond the overruling those cases. Those cases involve relatively nondenominational prayers; a very simple regent's prayer in *Engel* and the Lord's Prayer and verses from the Bible in the *Abington* case.

The present proposal would place no limit at all on the kinds of prayers that could be officially adopted by in public schools. Indeed, as Deputy Attorney General Schmults pointed out in his statement to this committee on August 18, the proposed amendment, and I am quoting, does not in anyway "limit the types of prayer that are constitutionally permissible."

If this amendment were added, it is true that many school districts might adopt relatively nondenominational prayers but many might also adopt very denominational, sectarian prayers that would be offensive, perhaps strongly offensive, to many of the people in the community, prayers that would choose between narrow questions of religious dogma.

In this connection, I should also point out that the amendment is drafted to say that "nothing in this Constitution" shall be construed to prohibit prayer in public schools. The words are not "nothing in the Establishment Clause." Thus, it would authorize official prayers that were racially offensive, politically offensive, or

offensive to people who believe in gender neutrality. A racist prayer would be perfectly constitutional under this amendment because it says "nothing in this Constitution" shall prohibit such a prayer. Even equal protection clause challenges are precluded.

That seems to me to be entirely unacceptable.

A second level of trouble that I have with the amendment is something that also has been mentioned. By permitting school districts, States, and boards to adopt prayers, you are creating an issue about first, whether or not to have a prayer, and second, about what prayer to have.

I must say, I am not quite as sanguine as one of the earlier witnesses about how that process would work. It seems to me entirely possible that there would be debates on the floor of the State legislature about what kind of prayer to have and whether to follow this sect's teachings or that sect's teachings. That level of entanglement of government in religious issues is again, it seems to me, unacceptable in view of our strong nonestablishment traditions. You would have political candidates running for office on the ground of what prayer they would support. Certainly, you would have people running for school boards, you would have people running for city councils and even State legislatures on this issue. Whatever you think of *Engel* and *Abington*, I cannot believe that most people in this country wish to see that level of entanglement created by our Constitution.

On the other hand, is there any strong reason for enactment of the proposed amendment?

The President, in his message to the Congress proposing the amendment, stated that without the proposed amendment there presently exists a total bar to school prayer in the United States.

I disagree with that statement. There does not exist a total bar to prayer in the public schools at present. Individual students and teachers can certainly pray silent whenever they wish in school. I would suppose that they would even pray aloud in school so long as they do not disrupt ongoing activity.

In addition, there is no reason to believe that a specific period, at the beginning of a schoolday, at the end of the schoolday, at any time of the schoolday, for silent meditation or prayer, for students and teachers to engage in that activity if they wish, would run into any trouble under the establishment clause. Finally, just last year the Supreme Court in *Widmar v. Vincent* held, 8 to 1, that State universities could permit—indeed had to permit—spoken group prayer by voluntary student groups so long as they generally had a policy of permitting student groups to have meetings in university facilities. We do not know yet the extent to which that decision will be applied to the public school setting, but it is possible that, in some circumstances, groups of students will be permitted to have spoken group prayer in public schools at times during the schoolday.

Given all of those opportunities for individual and group prayer in the schools, and all the opportunities that exist for individual and group prayer outside of the schools, it seems to me that it does not make sense to create both the enormous dangers of having narrowly sectarian prayers and the enormous dangers of entanglement

of Government and religious issues that this amendment would create.

Thank you very much.

Senator SPECTER. Thank you very much, Professor Bender. Your timing was precise.

Next, we have Professor William Van Alstyne from the Duke University School of Law.

Welcome, Professor Van Alstyne.

We look forward to your testimony.

Mr. VAN ALSTYNE. Thank you, Mr. Chairman.

I suspect that none of our testimony is terribly important. This is not an uncharacteristic hearing when the group thins out even before the proceedings get underway.

Another characteristic of these hearings is, however, that there usually does emerge one witness whose merely extemporaneous remarks are so special that they quite justly dominate the proceedings.

I think we have heard those remarks quite frankly. They are clearly not mine. They are rather Norman Redlich's.

I will give you a very brief extemporaneous resume of a longer and more professional statement which I will be flattered to have appear in your record and I mean every part of the statement that I have prepared.

Senator SPECTER. Professor Van Alstyne, your statement will appear in the record in full.

Mr. VAN ALSTYNE. If there were a presentation, I should want to emphasize to the Congress vicariously through these hearings, it would be that of Norman Redlich.

There is an explicit divisiveness that shall be planted in the Constitution by this proposal. Certainly not intended by its benign sponsors but explicit and unique in the Constitution, nonetheless, that will take from this country a distinction which it is unique to possess. In fact, I rather suspect the reason that the proposal is not viewed with very great alarm, is that we are totally accustomed to taking for granted the condition of the establishment clause, in fact, as the Supreme Court has quite correctly and conscientiously and scrupulously interpreted it to keep the Government as a target for various kinds of groups, which in their missionary zeal would attempt to establish their particular theologies as the dominant ones through Government, and to keep the Government turned from appropriating the power of religion to secular pragmatic instrumental uses on its own behalf.

The fact is, that this is just a beguiling amendment because we have never had the kind of regime which tolerates the collaboration of Government in the selection of a national or State or community theology.

We have in this country, as you are aware, and as I gather some witness are not, not merely one or two or three well-known sects, we have what are sheltered under the free exercise clause not less than 386 diversely recognized religions for purposes of protecting their own private prerogative. This amendment is impossible to implement without selecting among them. It will provide for the first time in this country a constitutional incentive for the state, on the one hand, to try to seize the instruments of religion, the kind of

claim of divine superiority as against other nation states and wrap it to its secular ambitions, and at the same time, it is holding out a kind of beguiling temptation of dominant sects to install a pallet form of their respective theologies to the instrument of commitant self, a profoundly wrong and ill-advised proposal.

My own testimony can only mind, however, the more profound rhetoric that you have heard from Norman Redlich. More discretely, I have the following kinds of specific objections:

The amendment will abandon the existing constitutional protection from sectarian conflict by providing an explosive political incentive for competing religions to establish their theology to the exclusion of others in public institutions. The accompanying analysis is quite explicit, as has been reiterated here; that the public authorities elect the particular character and content and indeed even the mode, according to its predominant prayers which will be proposed and prescribed by government.

The amendment will encourage the establishment of a dominant religious creed, even at the national level, which has not been addressed here.

All of this amendment has been addressed as though we were only dealing with community or at most statewide practice. The amendment sweeps much further than that. The accompanying material makes it quite clear what it means to permit the Federal Government, including this Congress, to install in all nationally superintended facilities. That character of particular voluntary prayer can change over to a prevailing majority in Congress. I assure you, as a hard matter of constitutional law, if this amendment is adopted, it will also enable Congress to override such States as to prefer to maintain a strict wall of separation by the following device.

This Congress may attach conditions to the granting of its largess, to the spending of its moneys; to the extent that this Congress determines that it is a better national policy to encourage voluntary prayer, even in State-run, federally-assisted public schools, it may, by the same technique it has used in other areas attaching conditions to its spending power, restrict the availability for such assistance to those States as will revise their own State constitutions and their own State laws, at least to permit that character of voluntary prayer, as Congress itself otherwise sees appropriate to prescribe for Federal institutions.

There is a covert federalism problem, as a matter of fact, that escalates the level of conflict, not merely between prevailing sects, between communities, between communities and State prevailing majorities, but into the halls of Congress jogging for position to install the favored form of voluntary prayer at the State and community level.

My time is up. I will stop, but I wish I could address you with more passion than the brevity of time permits.

The installation of the unique exception and collaboration of secular power to choose among religious beliefs in the United States is unprecedented and I believe it will give us a very grievous history of this Congress' acquiescence.

Senator SPECTER. Thank you very much, Professor Van Alstyne.

At this time, I will let you invite the panelists, the attorneys from the first panel, to rejoin us for just a few moments of dialog: Mrs. Meyers, Mr. Smart, and Professor Rees.

The record will remain open for a period of 10 days for supplemental statements and responses to questions that may be submitted to the panel.

But, having sat through this session, there are a few things on my mind, and I will do this relatively briefly, because there is relatively little time. I do want to express the regrets of the committee about the abbreviated proceeding.

The schedule is extremely crowded, something that you may have some idea about, from what appears in the public press, but it is hard to know it unless you are really here with the kinds of hearings that we have had. We had a very protracted one this morning, and I do not know why the antitrust sports bill was placed in the morning and freedom of prayer in the afternoon, but that was the scheduling. At this moment there is extended debate with somewhat different name commonly given to it on the Senate floor, of this issue of prayer, and there are matters pending on the debt ceiling and a tremendous list of issues which we are going to try to resolve, including 13 appropriations bills and continuing resolutions before we adjourn in early October.

Thus this is not the kind of attention which the Senate would like to give to this issue. There are many members on this committee, believe me, who are all in perpetual motion somewhere else, so that is why what is, is.

Mr. Sandalow, I was interested in your comment about 21 States having some form of legislation on the subject of remaining silent for school prayers, and what has been the litigation consequence of those enactments?

Mr. SANDALOW. There have been, I believe it is three decisions that have been tested in practice. I am afraid I do not have the citations with me. But they are cited in the report by the Legislative Reference Service, and all the decisions sustain the constitutionality of the practice.

One could imagine that——

Senator SPECTER. Excuse me.

Is one of those the three-judge court of Massachusetts cases?

Mr. SANDALOW. Yes.

One can imagine that a teacher might introduce the period of silence is an offensive way and the court might reach a different result. But if introduced as a period during which students might either meditate or pray——

Senator SPECTER. Well, Professor Bender referred to his judgment that silent meditation or prayer would be appropriate at the beginning or end of the day.

Was that the same sort of a factual situation that you were thinking of, Professor Bender?

Mr. BENDER. Yes.

Senator SPECTER. Does anybody disagree with the legal conclusion that there could be a period of silence?

Mr. REES. I would like to have a chance to check the record and submit something later.

It is my impression that courts may have found some of the offensive introductions to which Dean Sandalow refers. I have not seen the Legislative Reference Service report, but when I looked at a number of cases 3 or 4 months ago, I had the impression that the silent prayer decisions were divided.

It is important, on the fact situation to which Professor Bender refers, to note that while the court did hold in *Widmar v. Vincent*, that it was not unconstitutional for universities to permit group voluntary prayer after school, on the same terms as they let other groups meet, the Supreme Court has treated universities quite differently than they have treated high schools and elementary schools. They have drawn some theoretically problematic distinctions in the financing cases, and they denied certiorari on an extraordinary case in the second circuit, *Brandon v. Guilderland Board of Education*, in which the court said that it was a violation of the establishment clause for student groups to be allowed to meet after school during what was called the school day, while the students were still around, on the same terms as other groups.

So I do not think it is as clear as Professor Bender suggests that schools can find ways to accommodate students who desire to pray, under the present decisions.

Senator SPECTER. I had reviewed that legislative—that legislative analysis and my feeling was that it was an open question, and not really clear.

If you would care to submit something further, Professor Rees, we would be pleased to receive it.

Mr. REES. I will.

[Subsequent to hearing Mr. Rees submitted the following article:]

October 4, 1982

From: Grover Rees III
To: United States Senate Judiciary Committee
Re: Silent Prayers and the Federal Courts

Opponents of a constitutional amendment to restore the right to pray in public schools are fond of observing that students already have such a right: they can pray whenever they wish, so long as they pray silently. On one level, this statement is both correct and trivial: One can do anything anywhere so long as one is careful to do it in such a way that nobody notices. The use of the term "right" to denote the fact that one can pray with impunity so long as one prays silently would entail a radical reappraisal of the extent to which human rights should be said to exist in authoritarian and totalitarian regimes around the world. In this sense of the word, students have the right to pray in school not only in the United States but also in the Soviet Union. Citizens of South Africa and Cambodia have the right to call for the overthrow of the government, so long as they do it silently.

At the Senate Judiciary Committee hearing on the school prayer amendment, several amendment opponents argued that state or local education authorities have the power to grant or recognize a right to silent school prayer in a different and more important sense, even under the current decisions of the Supreme Court. The principal authority for this argument seems to be *Gaines v. Anderson*, 421 F. Supp. 337 (D. Mass. 1976), in which a three-judge federal court upheld a state statute providing that "a period of silence not to exceed one minute in duration shall be observed for meditation or prayer" in public schools. So far as I am able to determine, *Gaines* is the only reported federal case holding that states may allow students even such limited opportunities for prayer during the school day. Although I believe the case to be correctly decided, this belief is based

largely upon my conviction that the Supreme Court's prayer decisions were incorrect. Gaines is inconsistent with the language and the reasoning of the Supreme Court opinions and other federal decisions on school prayer, and should not be cited as a reliable indication of how other federal courts will treat official endorsement of the opportunity for silent prayer or meditation in public schools.

The opinion in Gaines relied on Justice Brennan's dictum in Abington Township v. Schempp, 374 U.S. 203 (1963):

It has not been shown that readings from the speeches and messages of great Americans, for example, or from the documents of our heritage of liberty, daily recitation of the Pledge of Allegiance, or even the observance of a moment of reverent silence at the opening of class, may not adequately serve the solely secular purposes of the devotional activities [that were involved in Schempp] without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government.

Id. at 281 (Brennan, J., concurring). It is important to observe, however, the context in which Justice Brennan's remarks were made. He was responding to arguments that school prayers served valid secular purposes, such as "fostering harmony and tolerance among the pupils, enhancing the authority of the teacher, and inspiring better discipline." Id. at 280. He did not even purport to hold that official provision for silent prayer would always be permissible; his allusion was designed simply to show that audible prayers were not necessary to achieve any secular purposes, since there were other means available that had "not been shown" to be objectionable. Moreover, Justice Brennan's remarks would seem to have no application at all to an official moment of silent prayer or meditation that was not intended to serve only secular purposes such as fostering harmony, inspiring discipline and enhancing the authority of the teacher. To the exact extent that opponents of a "moment of silence" can succeed in convincing the court that its real purpose is to allow students the opportunity to worship God in a public setting, the "solely secular purposes"

rationale will be inapplicable. Indeed, Justice Brennan pointed out that one test of the constitutionality of the various inspirational exercises to which he alluded was whether they "do in fact serve religious goals" as well as secular ones. Id. at 281. While it is true that courts are often deferential in their approach to legislative motive, reliance on such deference as a means of upholding the constitutionality of official opportunities for silent prayer amounts to saying that courts will permit legislatures to accomplish by subterfuge what they will not be permitted to do overtly. Such an approach can be expected to be as distasteful to supporters of school prayer --- many of whom wish to make precisely the point that the United States is "a nation under God" in which it is permissible to prefer religion over nonreligion in ways that do not violate the free exercise rights of dissenters --- as it is to the American Civil Liberties Union, whose Massachusetts affiliate argued that the statute in Gaines was an unconstitutional establishment of religion.

Even if the courts were to find that a moment of silence had a secular purpose --- either by overlooking the real purpose of the law, or by defining that purpose as the accommodation of free exercise rights, an approach followed in Gaines but rejected in other federal decisions --- it could be held unconstitutional either for having a "primary religious effect" or because of the risk of "entanglement" between the state and religion. See Lemon v. Kurtzman, 403 U.S. 602 (1972); Committee for Public Education v. Nyquist, 413 U.S. 756 (1973). A primary religious effect might be established by evidence that (whatever the motives of the legislature in passing the law) students overwhelmingly regarded the moment of silence as a time during which they were expected to worship. "Entanglement" might be the supervision of the

exercise by the teacher, or perhaps the teacher's announcement that the students were to meditate "or pray." Indeed, the Court has held that a law involving religion may entail impermissible "political entanglement" if political division over the wisdom or unwisdom of the law tends to be along religious lines, or even tends to demarcate a religious faction and a nonreligious faction. *Lemon, supra*.

No other federal court seems to have faced the problem addressed in *Gaines*, but decisions in related areas suggest that federal courts are increasingly impatient with laws designed to permit even unobtrusive and attenuated breaches of the court-created "wall of separation" between schoolchildren and religion. See, e.g., *Stone v. Graham*, 441 U.S. 39 (1980) ("The pre-eminent purpose for posting of the Ten Commandments on schoolroom walls is plainly religious in nature . . . and no legislative recitation of a supposed secular purpose can blind us to that fact."); *Nyquist, supra* (where the United States Supreme Court held that tuition vouchers and tax credits available to students at religious and nonreligious schools were unconstitutional, since most of the vouchers and credits would in fact be used at religious schools); *Brandon v. Board of Education of Guilderland Central School District*, 635 F.2d 971 (2d Cir. 1980) (public school need not allow a student group to meet after school for voluntary prayers on the same terms as other student groups are allowed to meet, since such meetings by the student prayer group would violate the Establishment Clause); *Lubbock Civil Liberties Union v. Lubbock Independent School District*, 669 F.2d 1038 (5th Cir. 1982) (the Establishment Clause forbids a school board to permit students "to gather at the school with supervision either before or after regular school hours on the same basis as other groups . . . for any educational, moral, religious or ethical purposes," since such a provision "has the primary effect of advancing religion.").

Although two or three federal court decisions contain dicta to the effect that silent prayer or meditation provisions would not violate the Establishment Clause, Gaines is the only case in which the court was directly presented with the question, and its holding has apparently never been cited by any federal court, or in any court other than the Massachusetts state courts.

In conclusion, supporters of school prayer --- even if they were willing to settle for a moment of silent prayer or meditation --- would not be wise to rely on the federal courts to be the guarantors of such a compromise. The constitutional amendment proposed by President Reagan would allow state and local education authorities to choose among competing policies toward prayer in public schools. I am personally persuaded that the provision of a moment of silent prayer or meditation is the best solution advanced so far for the accommodation of all points of view. The ratification of the Reagan amendment would present no obstacle to the choice of this solution by school authorities; indeed, it would resolve the doubts about the constitutionality of official provision for silent prayer that are currently cast by the federal court decisions I have discussed.

Senator SPECTER. And I would be interested if there is any difference of opinion

Professor Redlich?

Mr. REDLICH. I think that if we talk about a period of silent meditation or prayer, I think that is a close question and I think there is a reasonably good chance that it would be sustained. A period of silent prayer, I think, perhaps raises a—the same type of issue we have been talking about, but I think silent—

Senator SPECTER. Would you amplify the distinction which you see?

All of those who read this record, and some will may not understand it.

Mr. REDLICH. Well, I think it is possible for a person to meditate in a perfectly nonreligious manner and an opportunity to meditate at the start of the day about any one of a number of things that they might meditate about, is different from specifically saying that this is devoted to prayer.

Senator SPECTER. So you think the difference would be, if you say case 1, this time is devoted to prayer, you may pray or not.

Case 2, this time is devoted to prayer or meditation, you may pray or meditate, or neither?

Mr. REDLICH. You know, I know you are saying that those are fine lines and they are fine lines.

Yes; my answer is that would be the line, and you know in many respects we have drawn very fine lines like that on the question of aid to religious schools.

Where the tests can be held, who administers the tests, and I think that is an inevitable——

Senator SPECTER. We have drawn dotted lines and blurred lines, drawn all sorts of lines, drawn nonlines.

Mr. REDLICH. I do not find that an unreasonable one.

Senator SPECTER. Does anybody have a different view on the issue as to whether just silence, be it silence for prayer or meditation or both, an option to do neither, would anybody disagree that that would be constitutional?

Mr. STONE. I would simply elaborate.

I would think the conclusion of that, a time of silence is permissible, is not only the current state of the law, but in fact that it is a reasonable understanding. That is, there are important differences that should not be missed. It is not a simple line drawing question.

In the situation of time being allowed for meditation or prayer, the Government is not involved in the composition or selection or promotion of any particular prayer. The individual student is not directed to pray and the individual student is not faced with the choice of having either to pray or to leave the room, or to remain conspicuously silent when others are praying. So that there are important reasons underlying the distinction between Government-sponsored prayer on the one hand and the time of meditation on the other.

Senator SPECTER. I asked Mr. Schmults a question on this subject when he testified here, and he was dissatisfied with that scope of voluntary prayer, and he responded that he thought it appropriate to allow local boards to make decisions, local school boards to make decisions, and in effect, said that there is no reason to think that local boards will be less responsible to the Supreme Court or the professors or deans of America's finest law schools, no reason to think that they would be less sensitive as they would choose what would occur during this period of time.

What reason do you gentlemen have—one lady has left, apparently—to think that the school boards would be less sensitive?

This is an argument which was raised with some repetition in this room as we meet and argue on what we call markups. We have a significantly divided Judiciary Committee and again and again many will say, why should not we leave it to the States or the local governments, and why does the wisdom solely come from the Supreme Court of the United States, or whichever five are alined at the moment?

Mr. SANDALOW. Senator, if I may.

The Deputy Attorney General's statement rather misconceives the problem.

To my knowledge, the Court has not sanctioned either it or any other court in the United States composing a prayer to be stated by students in any school. The issue is not whether the Court is better or less qualified than a school board to compose a prayer; but

whether any official body should be composing prayers in the United States.

Senator SPECTER. But Dean Sandalow, why would you think that a school board would compose a prayer which would be offensive to anyone?

Mr. SANDALOW. I think that among the several thousand school boards in the United States, one ought to anticipate a variety of different responses.

My expectation, quite frankly, is that most school boards will react with sensitivity to the diversity of religious beliefs within their communities. I think it is—it would be extraordinary, however, if everyone of the several thousand school districts in the United States were to respond that way.

Senator SPECTER. All right.

So assume that some are nonsensitive. There is represented to be an enormous body of opinion in this country, some which I have seen in my travels around my State where they're very offended by the absence of prayer or an opportunity to pray, or at least a word that you cannot pray.

There is always, the Senate, they open with a prayer, prayers are here and prayers are there, why cannot we have prayers?

Now, there are a lot of people, some people, who are offended by the current state of the law. How do you balance out?

Mr. SANDALOW. As I have indicated in my statement, which will appear on the record, my own view is that the beliefs of those people are entitled to some recognition and I think that the Judiciary Committee could perform an extraordinarily useful purpose if it would undertake a study that might point the way to some guidelines, building on the *Widmar* decision in which those people who feel the need for public prayer at the beginning, before the beginning, or after the conclusion of the schoolday, might be provided an opportunity to do so.

I think that safeguards are necessary to assure, of course, that it is voluntary, to assure that religion is not given a perverted position as it was not in the *Widmar* case. But it ought to be possible.

Senator SPECTER. How would you do it?

Would you have an idea as to how their concerns might be accommodated along with yours?

Mr. SANDALOW. Yes, I think it would be—my own view is that it ought to be held permissible, consistent with the Constitution that we now have without an amendment for schools to grant permission to devotional Bible reading groups or prayer groups meeting outside of the normal school hours on equal terms with other sources of extracurricular activities.

Senator SPECTER. After school?

Mr. SANDALOW. Either before or after school, but make the classroom available in the same way that you might make a classroom available to the young Democrats or the basketball team.

Senator SPECTER. Young Republicans?

Mr. SANDALOW. Even young Republicans.

Senator SPECTER. Is that consistent with *Engle* and *Abington* in all of your legal judgments?

Mr. REDLICH. I would like to pick up an answer to your earlier question.

You asked why a school board would design a prayer which would be offensive and, my answer is, they have to, because there is no such thing as a religious prayer that is not going to be offense to some religious group, and it is only if we think of ourselves in terms of being all and part of a majority, all Christian, or one Christian sect, or all Jews, or all members of monotheistic faith, that one could conclude that a so-called nondenominational prayer is not offensive. The New York nondenominational prayer which was declared unconstitutional in *Engle*, was analyzed by a colleague of mine, Prof. Edmund Kahn, in a brilliant article and he demonstrated how that prayer was offensive to a whole range of religious faiths and, reading that prayer, you would think that it was the most purely nondenominational prayer that you could find.

I simply wanted to add that.

May I respond to you last question?

Senator SPECTER. Please do.

Mr. REDLICH. Your last question now.

I think there is the procedure that Dean Sandalow has outlined; it is not clearly unconstitutional under *Engle* and *Schempp*. I think it would still be an open question.

I do think, however, it would be terribly important under those circumstances that the public facilities be one, as in *Widmar*, which are open alike to a whole range of activities of which a prayer group might be one; that there be no indication of any imprimatur of approval, that it be open to all types of religious groups and that it not be part of the academic day.

Now, if all those, and perhaps other conditions might be met, and that are worth exploring, then I think one could create a situation similar to that which the Supreme Court approved in *Widmar*.

Mr. SMART. Mr. Chairman, if I might address that, also?

Senator SPECTER. Yes, please do, Mr. Smart.

Mr. SMART. I would like to amen, if I could—

Senator SPECTER. Is that OK? [Laughter.]

Mr. SMART. Dean Sandalow's comments and would point out to the committee that the last two pages of his prepared statement mentioned this problem, and I think that looking pragmatically at the fact that there are a lot of people who want to do something, so that religion does not feel completely alienated from public life completely, and, on the other hand, there are many people who are afraid of government-sponsored prayers, that this committee can, rather than simply leave the high school situation or the type of situations we have just been talking about, rather than leave it to the courts, since the Supreme Court has—appears to have no desire to get into the issues at this time, I would suggest that the committee consider legislation in this area, that would extend the *Widmar* principle with language consistent with the *Widmar* decision, to lower courts.

It would satisfy the people who feel the need to have religion, to be accommodated to some extent and it would not be offensive to most people who would realize that the Government would not be sponsoring religion or favoring it, but simply treating it on an equal basis with other activities.

Senator SPECTER. What do you think about that, Mr. Rees?

Mr. REES. Well, Prof. Van Alstyne expressed some federalism concerns and, speaking not as a student of the Constitution, but as a federalist or a political conservative, I have problems with attaching strings to Federal funds. It depends on how important the object is as compared to the principle of letting State and local governments make their own decisions on policy questions. As a political matter, I should say that attempts to achieve objects that are not considered "liberal" by attaching Federal funds invariably fail. Liberals will not support such attempts because they disagree with the ends, and some conservatives will not support them because they object to the means.

Senator SPECTER. But there is no suggestion to attaching Federal funds, is there, to what Mr. Smart has just referred to?

Mr. SMART. The proposal mentioned in my prepared statement does use that. It was felt that—

Senator SPECTER. Could not there be Federal legislation saying that this simply could be done without passing?

Mr. VAN ALSTYNE. Pursuant to what power?

There is no power to prescribe the order of the day in community and State fund schools. There has to be an enumerated or implied power, and I gather the origin of the suggestion was to use that which is to the largess spending power.

There is no direct—I do not mean any disrespect, but it is simply not given to Congress to construct the States respecting their responsibilities in the formulation of extracurricular events.

You have to attach it to some—it is barely imaginable, although I find it distasteful that we can abscond with the Congress power.

Senator SPECTER. Some say that the Congress has been doing that for a long time.

Mr. VAN ALSTYNE. Yes, but in a largess sense, we are gracefully moving to a kind of congenial alternative in this body and as much as I would appreciate the benefit of being rescued from this amendment by that alternatives, I think we will have lots and lots of problems at this time. It surely cannot specify many who want something more emphatic and more explicit.

The mere equivalent, after school hours of prayer groups, the same groups as philatelists—those interested in stamp collections, or coin collectors, you cannot account for this zeal, even as it entangles Congress in a whole series of prayer decisions.

Senator SPECTER. Do you prefer the amendment—some inequity to implement *Widmar* on a national basis?

Mr. VAN ALSTYNE. I do not think that the carrying through with the spirit of that case, equal protection to voluntary association on the campus, requires an agreement.

To that extent, I agree with my colleagues. It is a very interesting decision.

Senator SPECTER. Could we expand *Widmar* somehow to provide that opportunity as an alternative?

Mr. VAN ALSTYNE. It is not meant to sidetrack your interest here or the proceedings at all. My suggestion is that because the decision is quite new and its ultimate horizons are yet to be explored, I think it is premature for Congress to try to legislate it on the basis of what that holding might mean.

Senator SPECTER. You will probably not be surprised to hear that during the course of the filibuster, expansive discussion of the world's greatest body, say some, very infrequently takes up any of this intellectualness of cases.

Mr. BENDER. I am not sure that I favor legislation of the type that we are discussing, that is, applying *Widmar* to elementary and secondary schools, but I think I do disagree with Professor Van Alstyne about Congress power to do that outside of the spending power.

I think they could do that under the 5th section of the 14th amendment. *Widmar* is a decision which rested in large part on equal protection and free speech considerations. As Professor Redlich said, if you permit the rooms to be used by groups generally, then you cannot forbid religious groups from holding prayer meetings under *Widmar*. If that is the kind of legislation that would be proposed, I think Congress could do that as an enforcement of 14th amendment principles.

But I agree with Professor Van Alstyne that it might be too early to take that step. We do not know what the Supreme Court is going to do with *Widmar*. The mere denial of certiorari in *Brandon* is not completely indicative. The case did not hold that the establishment clause would be violated if a public school permitted voluntary prayer groups. That statement was not necessary to the holding in *Brandon*.

Senator SPECTER. Do we have to know that the Supreme Court is going to do?

Cannot the Congress act?

Mr. SANDALOW. I think this is a possibility, which would be less controversial than several that have been suggested thus far. It would break somewhat new ground for the Congress. It ought not to be—the Constitution ought not to be regarded as beyond the interests and the concerns of the Congress and, one possibility that would permit Congress to respond to the demands that it act in some measure on this problem would be a sense of the Congress resolution that it is not inconsistent with the establishment clause to have practices in local school districts of the kind that we have been discussing.

It would not then have to be tied to any power of the Congress because Congress would not be compelling.

Senator SPECTER. Just a statement that this is a good thing?

Mr. SANDALOW. Just a statement that this is a good thing.

Mr. STONE. I should like to point out at least one complexity in "extending" *Widmar* through legislation. It should be remembered that there are really two aspects of *Widmar*.

First, the Court held that to permit religious organizations to meet on university property on the same basis as nonreligious organizations would not violate the establishment clause.

Second, the Court held that to exclude religious organizations from meeting on university property would violate the free speech component of the first amendment. Which of those two aspects are we talking about? It is one thing, perhaps, to say that a school board may permit religious organizations to meet on school property on terms equal to nonreligious organizations. It is another thing to say that a school board must permit religious organizations to

meet on school property. The former gives discretion to the school board; the latter would eliminate all discretion. What, then, do we mean when we speak of "extending" *Widmar* by legislation?

Senator SPECTER. Professor Redlich, you spoke about the advantages of your growing up in a society where—which was neutral toward religion, but you also grew up for *Engle* and *Abington*.

What problems did you have?

If I may personalize the question more. You do not have to respond personally, of course.

Mr. REDLICH. I can recall religious practices in school. I can recall when the assumption somehow was that Christmas was a religious event that everybody observed and I can recall my unease, my feelings of discomfort as being somehow excluded, as no recognition of the fact that I did not celebrate Christmas as a religious event. And while we have all had the benefit of the basic concept of religious neutrality, *Engle* was a terribly important decision in moving us away from Government-sponsored religious observances in the schools at a time when children are very impressionable and I recall that experience very well.

I was brought up in—as a youngster, in two public schools in the Bronx and religious practices that most people thought were benign, and no one intended to be coercive, were certainly not viewed as benign by me.

Senator SPECTER. Did they not make you more resolute in your determination to follow your own religion?

Mr. REDLICH. I do not know. I do not think one can answer that question.

I would only say that a coercive practice should never be condoned on grounds that those who are coerced somehow become more religious.

Senator SPECTER. But the question of whether it was coercive depends on the reaction to it. It may tend to be coercive. You, perhaps, were not coerced and perhaps people are not coerced by some conduct which might be interpreted as coercive.

Mr. REDLICH. But the question of coercion is not a matter of whether we are coerced into reciting a prayer that we do not believe in; that is the definition of coercion that the sponsors of this amendment would like adopted; that is not the definition of coercion as far as I am concerned.

I think that every American is entitled to be able to conduct his or her religious life free from having an officially sanctioned form of worship.

In countries that have that establishment, Canada and England, there may be free exercise but the religious minority is pursuing their religious faith by virtue of the sufferance of the majority. The majority has said we have decided to allow you to practice, that you may practice your religion. You go into the Province of Quebec, you will see that Jews are lumped as Protestants, for purposes of the Quebec school system.

In the United States, there is a very different concept, the concept being that religiously we are all equal. There is no sanction.

Senator SPECTER. But that was so before *Abington*.

Mr. REDLICH. Yes, and it was so before *Engle* and *Abington*, and to the extent that prayers were permitted in the schools, that I

have always felt was a departure from the principle of religious entrapment. After all, we have had many instances in criminal procedure, race relations, where the Supreme Court through constitutional interpretation has been truer to the constitutional principle than before that case. I think that is what happened in *Engle*, and a very unfortunate service, of practices overtly religious activities in public institutions have been removed and I am grateful.

Senator SPECTER. Professor Redlich, you say this is a truer application after the decisions. That may be so in your view and not so in other views.

Now, I respect your conclusion that this is, at least for you, and perhaps it is for me, too, but by the same view I respect the conclusion that you would like to see maximum amounts of neutrality in the total absence of any coercion.

There are many who do not think it is coercive. So I come to the question of about what harm was Norman Redlich, as a youngster, coerced? Or stated somewhat differently, did Norman Redlich as a youngster sustain any damage?

Because if you only found it distasteful, but you were not coerced, maybe all of this was not so bad.

Mr. REDLICH. I think it was distasteful, I think it is coercive, and I think it is terribly harmful in a matter as personal as religion to have a person be subjected to a religious practice which the majority of the people are able to impose upon the minority and the fact that you do not tell the person to recite the prayer does not make it any less. The imposition of that official religious dogma and, I think it is terribly harmful to young people to be subjected to that and, if I may say so, I think it is quite irrelevant as to whether one person or many survive that.

There have been instances—when I went to college, we had fraternities that did not accept Jews and blacks. After I went to college, those were like all the fraternities, what they were like; an individual managed to go through a system like that and not come out with psychological scars, does not mean it is type of practice that we should condone. The fact is that there is something basically violative of free religion to have a government sanction of one religious faith and one has only to—I know that our law school, which, after all, is a private law school, at one time, the holiday party in December was called a Christmas party. Christmas decorations, religious decorations, etc. Large numbers of students and these were not young people, they were law students, came to the school and with deep conviction said that this was their educational home, they were part of this community.

This community was not one which was going, in their view, had the right to say, was going to endorse one particular religious faith and one had only to see the deep sincerity in their mind and in their expression of view, to realize how they, indeed, were hurt by that practice. It has been long since eliminated.

Mr. SMART. Mr. Chairman, if I could speak to that, briefly?

Senator SPECTER. Mr. Smart.

Mr. SMART. I will not dwell on it very long. I think it has been well spoken but I would like to say in the context of all this, let us keep in mind that education is a value-laden process. It has become

so. There is much in education that may offend me or offend somebody else, without being coercive to us.

I do not—have not come to advocate teacher-led prayers specifically, but the accommodation of religion, if it is offensive to someone else, or if it is offensive to me, there is also a lot of other things that I—that may irritate me or offend me, and yet I think of that part of the process of surviving is to learn to deal with those things and there is no way we can clear our school systems of everything that might offend.

We have sex education courses, we have civics courses, we have all kinds of things that may or may not offend. We have the flag salute in the *Barnett* case, and so on.

These types of things, I think in perspective, we should keep in mind that it is a value-laden process.

Senator SPECTER. Professor Stone, you brought up the subject of the insertion perhaps of prayer, prayer that students would be listening to.

Do you concur with Professor Redlich?

Mr. STONE. First of all, I think the issue is not one of being offended. No one is suggesting that the practice of prayer in public schools is undesirable or unconstitutional because it offends observers.

That is not the issue.

The issue instead—and another point is the pressure that is imposed upon individuals to participate against their will. You know, it is true, as Mr. Smart suggested, there are other forms of coercion, pressures that are applied in the schools upon the students. Pressure to do one's homework, pressure to participate on sports teams, pressure to do all sorts of things that they may not like to engage in. What matters is not only the degree of pressure but also what is it one is being coerced or pressured to do?

How offensive is it to us as a society for the student to do that thing and in addition how legitimate is the Government's interest that is being furthered by that pressure?

It seems to me that religion in this country has been recognized rightly, especially that to compel an individual, to pressure an individual, to a firm belief that is contrary to his religious beliefs, is in a fundamental sense different from requiring him to do his homework or even to listen to or participate in sex education. Similarly, it seems to me that the Government's interest by creating this pressure on children, is attenuating at best. When one compares the school prayer with the moment of silence, it would seem that whatever advantage is to be used by the prayer rather than silence, is questionable legitimacy at best.

Why is it that it is necessary to go through this exercise of Government-sponsored prayer, rather than having a moment of silence?

Is it coerced? Is that the reason? Is it to make sure that the children, in fact, really do pray rather than think of something else?

Is it to enable the Government to write the prayer or select the prayer?

None of these interests to me are sufficiently important to justify the imposition in that context that is created.

Mr. VAN ALSTYNE. May I say something about this, Senator?

I agree with both what Mr. Redlich and Mr. Stone has said, but there is a later element.

Senator SPECTER. Mr. Redlich and who else?

Mr. VAN ALSTYNE. Mr. Stone.

If there were no coercion, it would seem to me nonetheless remarkable if the Government did not see something additionally wrong with Government efforts to install particular theologies within the Government itself. The Government is a great teacher through techniques other than merely taking advantage of people, of youngsters attending public school under compulsory circumstances.

The necessity of hitting upon the particular liturgy, the context of the prayer, may be compromised, but it is necessarily there. The Government teaches, and it teaches others, therefore, what is the Government's own view; what is the proper view; what is the preferred view, as to what is the appropriate relationship between human beings and metaphysical beings.

It takes and prefers theology.

I think what Mr. Redlich was saying in part in his earlier remarks is that the installation of preferred theologies, no matter how they may seem to some, nevertheless, makes all others strangers in their own land.

Whatever their particular set of beliefs is, to the extent that it is not in conformity with the majority, they are taught by the Government.

Senator SPECTER. Do you think there is insufficient protection from the sentence, "No person shall be required by the United States in participating in any prayer"?

Mr. VAN ALSTYNE. Absolutely. It is completely beside the point as far as this issue is concerned. To my judgment, they speak of profoundly offending the notion that the government has no business of identifying itself with a particular theology although no one would direct it to attend such ceremony.

The spending of government money in State theologies seems to me frivolously wrong, although no one is coerced to pay it or seek a deduction back from the IRS.

You mentioned the prayer specifically in *Engle*. Mr. Redlich did, as well.

May I tell you, sir, that it was a compromise prayer but in every respect, it may be the choice amongst diverse sects within the public school population in New York, and in no single respect was it neutral.

The appropriate form of praying, according to the Regent's proposal is that prayers are appropriately performed orally in unison with others in a secular place, in a standing position, under the guidance of the public school teacher. The appropriate object from which one prays is to invoke divine blessing, according to the preferred State theology, and the object of the State theologies were first, the State. One prays for the blessings of one's country and second, for the State's agents, its teachers. The proper prayer is a unitary metaphysical sense, that is, a single and singular God.

The single characteristic of the single God registered in the *Engle* compromise prayer is that he is totally powerful; that is, to say is almighty. There is no element of that prayer which reaches

a common accord among the disciplines in the school population of New York.

Senator SPECTER. Mr. Rees, do you have a comment?

Mr. REES. What this signifies to me, the alleged offensiveness not only of the words of the prayer, but of the other details—whether the prayer is said standing up and so forth—is that somebody can be found who will object to any prayer or to any accommodation of prayer. It is important to remember that not everyone on this panel would accept even the moderate and very thoughtful proposal that Dean Sandalow has made.

And it is crucial to remember that—although there is nobody on this panel representing this position—you have some constituents, and I have met some people, who are offended in very much the same way by the absence of prayer in the school today. They believe that that is not a neutral position. They believe that when schools treat everybody, Brezhnev and Reagan and George Washington, as real and important, except God who is not mentioned at all, that this is not a form of neutrality; that a subtle or not-so-subtle message about God is being conveyed to their children.

This puts the Government between a rock and a hard place. It does not, I think, compel the conclusion that the opponents of the amendment are suggesting, which is that there has to be one solution for every school district and that the solution has got to be no prayer at all.

Now, what does compel that conclusion is, I think, another underlying assumption, which is a double standard for evaluating decisionmaking that happens in courts and decisionmaking that happens in communities.

When it comes to the Supreme Court, we are told, well, certainly you might not agree with this decision or that decision, but if the courts are generally doing a good job then we must leave the courts alone and not resort to such radical measures as constitutional amendments. When it comes to communities, however, we are told that if even a few communities are likely to do something offensive, something that we here at this table would not want them to do, then we should deprive all communities of the power to choose among the different solutions.

I do not care whether you call having a prayer and not forcing anyone to participate in it merely offensive, or whether you call it a certain kind of coercion. If you call it coercion, you have to give me another word for real coercion. But whatever it is, you have to remember that it is not going to offend or coerce anyone any more than the people who are not allowed to begin their school day with a prayer now feel offended and coerced.

Senator SPECTER. Thank you very much, Mr. Rees.

[The prepared statements and submissions of Messrs. Sandalow, Stone, Redlich, Bender, and Van Alstyne follow:]

PREPARED STATEMENT OF TERRANCE SANDALOW

I want to thank the members of the Committee for inviting me to testify regarding Senate Joint Resolution 199, which proposes a constitutional amendment relating to prayers in public schools and other public institutions. Because of the limited time available, I shall confine my testimony to the most important and most controversial feature of the proposed amendment, the abandonment of virtually all constitutional restrictions on prayer in the public schools.

In Engel v. Vitale, 370 U.S. 421 (1962), the Supreme Court invalidated a local school board's policy requiring students at the beginning of each school day to recite a prayer composed by the New York Board of Regents. One year later, in Abington School District v. Schempp, 374 U.S. 203 (1963), the Court invalidated a requirement that public schools open each day with a selection and reading of verses from the Bible, followed by student recitation, in unison, of the Lord's Prayer. In both cases, the Court rested upon the establishment clause of the first amendment, which under prevailing constitutional doctrine is made applicable to the states by the fourteenth amendment. S.J.Res. 199 seeks to overturn these and several decisions by lower courts, both state and federal, that have restricted prayers in the public schools in a number of other settings. It would do so by the simple and forthright expedient of amending the Constitution to provide that "Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools. . . ." The only qualification to this sweeping renunciation of constitutional authority is contained in the proposed amendment's second sentence: "No person shall be required by the United States or by any State to participate in prayer."

Before discussing the merits of the proposed amendment, it may be useful to consider briefly the nature of the question that the Congress must decide in determining whether to adopt S.J.Res.

199. Proponents of the amendment often seem to argue, if only obliquely, that a constitutional amendment overturning Engel, Schempp, and related decisions is justified because those decisions rest upon (what are asserted to be) erroneous interpretations of the first and fourteenth amendments. An examination of the question whether the courts did err in those cases would carry us very far into constitutional theory and is, in my view, unnecessary and perhaps irrelevant to the issue that the Congress must now decide. Our constitutional tradition does not impose upon Congress responsibility for reviewing the courts' constitutional decisions and proposing an amendment whenever it concludes that the courts have strayed from the Constitution's true meaning. Neither the processes nor the resources of Congress are adequate to that task. The question that Congress must decide, to put the point somewhat differently, is not a question of law, but a question of policy: whether the welfare of the nation would be served by removing from the Constitution all restrictions upon prayer in the public schools? I turn now to that question.

President Reagan, in proposing the amendment contained in S.J.Res. 199, wrote that it would merely "restore the simple freedom of our citizens to offer prayer in the public schools. . . ." With deference, I submit that the disarming simplicity of the President's characterization cloaks the real issues that the proposed amendment raises, issues that are considerably more complex than his statement suggests.

To begin with, no constitutional amendment is required to restore the freedom of children to pray in school. As reported in a recent study by the Congressional Research Service, 21 states have adopted statutes requiring or permitting schools to observe periods of silence during which students may meditate or pray. Ackerman, Legal Analysis of President Reagan's Proposed Constitutional Amendment on School Prayers 9 (Cong.Res.Serv. 1982). The only courts that have considered the practice have sustained its constitutionality, id., at 8-9, a conclusion that is

undoubtedly consistent with the Supreme Court's decisions in Engel and Schempp. See Abington School District v. Schempp, supra, at 280-21 (Brennan, J., concurring). The courts have also uniformly sustained the inclusion of invocations and benedictions in public school commencement ceremonies and the holding of baccalaureate services in the public schools. See Ackerman, supra, at 9-10.

The consequence of adopting the amendment proposed by S.J. Res. 199 would, thus, not be simply to permit prayer in public schools, for prayer in public schools is not now generally forbidden by the Constitution, but to permit it in the forms and in the circumstances in which it is currently impermissible. The position of the amendment's proponents is that, so long as individuals cannot be compelled to participate, any form of prayer in the public schools should be permitted in any circumstance. In their view, the content of and circumstances for prayer in the public schools should become the subject of political decision or, failing political decision, should be left to school officials and teachers in each of the tens of thousands of classrooms in the United States. I hold a very different view. Although I am inclined to believe that several lower courts have been unduly restrictive in the limits they have imposed upon prayer in public schools, I think that the removal of all constitutional limitations invites a mixture of politics and religion threatening to the body politic and inconsistent with our traditions of religious freedom and tolerance. An analysis of the varying practices that would become constitutionally permissible if the proposed amendment were to be adopted offers a framework for developing the reasons for these concerns.

The Prayer Amendment was deliberately drafted to permit decisions regarding the content of prayers to be prescribed by ordinary political processes. A state might thus prescribe a prayer or it might leave communities free to do so. It is a truism, but one

that bears repeating, that Americans worship God in many ways. If the amendment is adopted, the question that must arise in each state and each school district is which of the ways should be prescribed. One need not suppose that that issue will be divisive in every community to recognize that it will be the subject of intense, perhaps bitter conflict in many. Prayers often begin with a recitation of a biblical verse. Is the King James version or the Douay to be used.^{1/} Shall the New Testament be avoided in deference to the beliefs of Jewish children? Shall the Bible be avoided in deference to the beliefs of the increasing number of Americans who are neither Christians nor Jews?

Differences about the place of the Bible in prayer are merely illustrative of the broad range of disagreements with which the political process would be required to contend if the proposed amendment were to be adopted. The forms and content of prayer, for the many millions of Americans who regard it seriously, are matters of vital importance, for prayer is an expression of their profoundest beliefs. Yet the beliefs that are expressed in prayer are the source of deep divisions among our people, at times even among the adherents of what might generally be regarded as a common religious tradition. As the Supreme Court of Wisconsin observed many years ago, among Christians some

"... believe the doctrine of predestination, while others do not; some the doctrine of eternal punishment of the wicked, while others repudiate it; some the doctrines of the apostolic succession, and the authority of the priesthood, while others reject both; some that the holy scriptures are the only sufficient rule of faith and practice, while others believe that the only safe guide to human thought, opinion, and action is the illuminating power of the divine spirit upon the humble and devout heart; some in the necessity and efficacy of the sacraments

1. See, e.g., *State v. District Board of School Dist. No. 8 of Edgerton*, 44 N.W. 967 (Wisc. 1890), a suit by Catholic parents to prohibit devotional readings from the King James version of the Bible.

of the church, while others reject them entirely; and some in the literal truth of the scriptures, while others believe them to be allegorical, teaching spiritual truth alone or chiefly. . . ." State ex rel. Weiss v. District Board of School Dist. No. 8, supra, at 972.

Adoption of the Prayer Amendment would open the way for each of these issues, and manifold others that divide religious groups, to become the subject of political dispute. It would invite the adherents of each of the many religions represented in our nation to seek official sanction for its version of religious truth, if only to ward off the efforts of others.

Testimony before the Committee, even by those who are generally supportive of the amendment, reveals that the problem cannot be avoided. It inheres in any attempt to formulate prayer through a political process. Thus, a spokesman for the National Association of Evangelicals objected to the supposedly "non-denominational" prayer involved in Engel v. Vitale. "That kind of prayer, routinely repeated every school day, is far removed from the kind of meaningful religious expression that should be permitted in the public schools." Statement of Robert P. Dugan, July 29, 1982. Yet, it is apparent that prayers acceptable to the membership of the National Association of Evangelicals, prayers they would regard as a "meaningful religious expression," would contradict the deeply-held beliefs of many others.^{2/} But, if the Prayer Amendment were to be adopted, it is not obvious what alternative evangelicals would have to seeking modes of prayer that would, in their view, offer their children an opportunity for "meaningful religious expression."

The success with which the United States has managed its unique religious pluralism is in substantial part attributable to its having been able to avoid pitting religious groups against

2. It should be noted, to the credit of Mr. Dugan and the Association he represents, that they are sensitive to this difficulty and urged revision of S.J.Res. 199 to preclude any governmental influence on the content of prayers in the public schools.

one another in the political arena. No doubt, the good will that our traditions have fostered would lead many to act with restraint even if the Prayer Amendment were adopted. But the risk is nonetheless great that adoption of the amendment, by inviting the establishment of official prayer, would lead to a significant increase in religious dissension.

The removal of a constitutional restraint upon the establishment of official prayers is not the only objectionable feature of the proposed amendment. In recent years, a number of school districts have authorized teachers to lead their classes in prayer at the beginning of the school day or to select students to do so. Courts that have considered the practice have uniformly held it an impermissible establishment of religion. Karen B. v. Treen, 653 F.2d 897, aff'd 102 S.Ct. 1267 (1982); Kent v. Commissioner of Education, 402 N.E.2d 1340 (Sup.Jud.Ct. of Mass. 1980). See also, Collins v. Chandler Unified School Dist., 644 F.2d 759 (9th Cir. 1981), cert. denied 102 S.Ct. 322 (1981). Adoption of the Prayer Amendment would overturn these decisions and render the practice permissible, almost certainly leading to its institution in some school districts. Although a policy permitting students and teachers to lead prayers would avoid the need to compose official prayers, and the political divisiveness that would attend that activity, it would increase the risk of religious activity in the nation's classroom that would be deeply offensive to many parents and children. Many, perhaps most, teachers and students might be expected to act with sensitivity toward the diversity of beliefs represented among the student body, but it seems hardly open to doubt that among the tens of thousands of teachers and millions of students in the nation's public schools there would also be many who would regard the opportunity to lead prayer as an opportunity to proselytize or who would merely act with insufficient sensitivity to the beliefs of others. The record in Kent v. Commissioner of Education,

supra, demonstrates that such concerns are not fanciful. It disclosed that among the prayers offered by students were some that were clearly denominational, such as the Lord's Prayer and Hail Mary, and others that would undoubtedly be regarded by some as offensive because directed toward trivial secular objectives, such as victory in a volleyball game. Reliance upon the administration and governance processes of the schools to avoid such problems would place school officials in the intolerable position of censoring prayers.

In brief, the offering of public prayers as part of the daily routine of public schools cannot be accommodated within a society as religiously varied as ours. A constitutional amendment that would remove all constitutional restriction on such prayers risks both a significant increase in religious discord and daily affront to the religious sensibilities of large segments of the population. Nevertheless, the interests of those whose beliefs require such prayer ought not to go unrecognized. Opponents of the Prayer Amendment have frequently suggested that those interests are sufficiently recognized by the opportunity for silent prayer and for prayer in settings other than the schools. Yet, the beliefs of many parents and children appear to require more, an opportunity for a public profession of faith and for public prayer as part of the daily routines of life. Although the schools may not, as the courts have held, have a constitutional obligation to accommodate these beliefs, respect for the parents and children who hold them ought, in my judgment, to lead us to do so as a matter of policy if a suitable means can be found for doing so. As least, there ought not be a constitutional obstacle to a school board's power to adopt such a policy.

In a number of school districts, children have sought permission to use schoolrooms, before or after the commencement of the school day, for voluntary prayer or devotional Bible-reading. Several lower courts have held that the establishment clause denies the schools authority to confer such permission. See

Brandon v. Board of Education of the Guilderland Central School Dist., 635 F.2d 971 (2d Cir. 1980), cert. denied 102 S.Ct. 970 (1981); Johnson v. Huntington Beach Union High School Dist., 137 Cal.Reptr. 43 (Ct.App.), cert. denied 434 U.S. 877 (1977); Trietley v. Board of Education, 65 A.D.2d 1 (1978). Although the concerns that have led the courts to this conclusion, especially the risk that the imprimatur of the schools would be placed upon religious activities and the fear that children might be coerced into attendance, are matters that require serious attention, one wonders whether a solution for them might not be found that would more fully recognize and accommodate the needs of families whose beliefs do require an opportunity for their children to open the day with public prayer. This is not an appropriate occasion for a full constitutional analysis of the issue, but I may say that I am far from persuaded that a carefully designed policy would not pass judicial muster. Cf., Widmar v. Vincent, 102 U.S. 269 (1981). A careful study of the issues by the Judiciary Committee might greatly assist local school districts that wish to consider such a policy and lead the way toward a resolution of the school prayer issue that is more sensitive to the contending interests than S.J.Res. 199.

PREPARED STATEMENT OF GEOFFREY R. STONE

Twenty years ago, in Engel v. Vitale,¹ the Supreme Court invalidated the practice of government sponsored prayer in the public schools. In 1951, the New York Board of Regents, "aware of the dire need . . . to pass on America's Moral and Spiritual Heritage to our youth," devised a prayer to be recited at the opening of classes each day to "strengthen . . . the belief in a Supreme Being."² The prayer: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country." The Board of Education for the New Hyde Park school district directed that the Regents' prayer "be said daily in our schools."³ The prayer was said aloud at the beginning of classes each day, led by the teacher or a student singled out by the teacher for this purpose. Students who did not wish to participate were excused from participation or permitted to leave the classroom.

The Court, in a six-to-one decision, held that "by using its public school system to encourage recitation of the Regents' prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause."⁴ Justice Black, speaking for the Court, explained that "this very practice of establishing governmentally composed prayers for religious services was one of the reasons which caused many of our early colonists to leave England and seek religious freedom in America."⁵ As a result, Black noted, the framers of the First Amendment "knew the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval," and the First Amendment "was added to the Constitution" in part to assure "that the people's religions [would] not be subjected to the pressures of government for change each time a new political administration is elected to office."⁶ Thus, Black concluded, "the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official

NOTE,---Footnotes appear at end of article.

prayers for any group of the American people to recite as a part of a religious program carried on by government."⁷

Moreover, Black maintained, "[n]either the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of students is voluntary can serve to free it from the limitations of the Establishment Clause. . . ."⁸ On the coercion issue, Black suggested that "laws officially prescribing a particular form of religious worship [may in fact] involve coercion," for "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."⁹ Ultimately, however, Black found it unnecessary to rule on coercion, for "[t]he Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not."¹⁰ The Establishment Clause, Black explained, was premised upon two central assumptions: "that a union of government and religion tends to destroy government and to degrade religion," and "that governmentally established religions and religious persecution go hand in hand."¹¹ Black concluded that, wholly apart from any coercion, "[t]he New York Laws officially prescribing the Regents' prayer" were "inconsistent" with these assumptions.¹² In answer to the argument that the Regents' prayer "does not amount to a total establishment of one particular religious sect to the exclusion of all others," and that "the Regents' official prayer is so brief and general [that] there can be no danger to religious freedom in its governmental establishment," Black called forth "the words of James Madison, the author of the First Amendment: "'[I]t is proper to take alarm at the first experiment on our liberties. . . . Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other[s]?"¹³

A year after Engel, the Court, in Abington School District v. Schempp,¹⁴ considered the constitutionality of a Pennsylvania law requiring all public schools to begin each day with readings from the "Holy Bible." Pursuant to this statute, the Abington Senior High School broadcast "opening exercises" while pupils attended their homerooms or advisory sections. These "exercises" included readings by selected students of ten verses from the "Holy Bible." The student reading the verses was permitted to select the passages and to read from any version he chose, although only copies of the King James version were furnished by the school. The reading of the verses was followed by recitation of the Lord's Prayer, likewise over the intercommunications system. Students were asked to stand and join in repeating the prayer in unison. Students who wished not to participate were permitted to leave the classroom or simply to remain silent.

Building upon Engel, the Court, in an eight-to-one decision, held this practice unconstitutional. Justice Clark, speaking for the Court, recognized that "[w]e are a religious people whose institutions presuppose a Supreme Being."¹⁵ Indeed, Clark noted, our religious background "is evidenced today" in our oaths of office and in the prayers with which we traditionally begin our legislative and judicial sessions.¹⁶ Clark emphasized, however, that "religious freedom is [likewise] strongly embedded in our public and private life."¹⁷ Thus, Clark explained, if either the purpose or primary effect of a law "is the advancement or inhibition of religion then the enactment [violates the First Amendment]."¹⁸ Clark added that this "wholesome 'neutrality'" does not reflect any hostility to religion but, rather, is designed to prevent "a fusion of governmental and religious functions or a concert or dependency of one upon the other."¹⁹

Applying the "purpose or primary effect" standard in Schempp, Clark noted that the "exercises are prescribed as part of the curricular activities of students who are required by law to attend school," and that "such an exercise is a religious ceremony and was intended by the State to be so."²⁰ Clark thus

concluded that the exercise violated "the command of the First Amendment that the Government maintain strict neutrality, neither aiding nor opposing religion."²¹

The decisions in Engel and Schempp triggered heated debate. Not surprisingly, the reaction divided sharply along denominational lines: Catholics tended to condemn the decisions; Jews were generally supportive; Protestants were divided.²² Since 1962, critics of the decisions have attempted to overturn them by constitutional amendment. Within three days of Engel, more than fifty proposed constitutional amendments had been introduced, and by the end of the 88th Congress, after Schempp, more than one hundred fifty such amendments had been offered. Proposed constitutional amendments seeking to overturn these decisions have been introduced in Congress in every year since 1962. The Senate has voted twice on such proposals, the House once. In each instance the measure was defeated.²³

On May 17, 1982, President Ronald Reagan proposed a constitutional amendment to "remove the bar to school prayer established by the Supreme Court and allow prayer back in our schools."²⁴ The proposed amendment provides:

Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any State to participate in prayer.

This amendment should not be enacted.

1

Engel and Schempp are founded upon a perfectly reasonable understanding of the Establishment Clause. They are in accord with the Court's precedents,²⁵ and they are consistent with the language, purposes, and history of the First Amendment.

Although the practice of government sponsored prayer in the public schools may not in itself amount to the formal "establishment" of a state religion, "the First Amendment, in its final form, did not simply bar a congressional enactment establishing a church;" it forbade all laws respecting an establishment of

religion."²⁶ Moreover, the practice of government sponsored prayer in the public schools directly implicates the most fundamental values underlying the First Amendment. Unlike other Establishment Clause questions, the school prayer issue does not involve the neutral provision of wholly secular government services, such as fire and police protection, to both religious and secular institutions.²⁷ Nor does it involve the neutral and essentially passive acquiescence of government in the conduct of both religious and secular activities on government property, such as the distribution of leaflets on public streets.²⁸ Rather, government sponsored prayer in the public schools involves direct and active government involvement in the encouragement and structuring of perhaps the most basic form of religious activity -- prayer itself. For government to compose, select, or promote prayers to be recited by children in a setting dedicated specifically to the inculcation and "preservation of values"²⁹ would seem necessarily to threaten the constitutionally compelled separation of Church and State and to undermine the fundamental principle that "religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by [civil authority]."³⁰

Three arguments are most commonly offered in opposition to Engel and Schempp. First, it is sometimes said that Engel and Schempp are predicated upon a misguided notion of "neutrality." Under this view, the Establishment Clause "command[s] impartiality [only] as among the various sects of theistic religions, that is, religions that profess a belief in God. But as between theistic religions and those nontheistic creeds that do not acknowledge God, the precept of neutrality [does] not obtain."³¹ Accordingly, so-called "nondenominational" prayers, such as the Regents' prayer invalidated in Engel, pose no Establishment Clause issue.

At the outset, it should be emphasized that the proposed constitutional amendment cannot be defended on this basis, for as the Administration itself concedes, "[t]he proposed amendment . . . does not . . . limit prayer in public schools . . . to

'nondenominational prayer.'³² In any event, this understanding of the First Amendment seems doubtful, at best. At the time the First Amendment was enacted, several "state constitutional provisions used definite phrases such as 'religious sect,' 'sect,' or 'denomination,'" and it seems unlikely that the framers would have selected the obviously more expansive phrase "religion" if they "intended to prohibit nothing more than what the States were prohibiting."³³ Moreover, this understanding of the Establishment Clause would exclude from the protections of the Clause the members of such faiths as "Buddhism, Taoism, Ethical Culture, Secular Humanism and others,"³⁴ and would thus conflict with the central premise of religious toleration upon which the First Amendment is founded. A more sensible construction, long embraced by the Court, maintains that the Establishment Clause was designed not only to forbid "governmental preference of one religion over another," but also "to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business. . . ."³⁵ Under this construction, government cannot "constitutionally pass laws or impose requirements which aid all religions as against non-believers, and [it cannot] aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."³⁶

Moreover, even if the alternative interpretation were historically supportable, the very concept of a "nondenominational prayer" is "self-contradictory: it is a chimera."³⁷ There are more than two hundred different sects in the United States, each of which has its own tenets regarding the appropriate nature and manner of prayer. Any effort to compose a truly nondenominational prayer must thus produce, at best, a sterile litany virtually devoid of true religious meaning. And even if one could compose a meaningful nondenominational prayer, there is the very real and widely recognized danger that "the official promotion of common-denominator religious practices, conspicuous by their vagueness and syncretistic character, [could contribute to the development] of an official folk or culture

religion which [could pose] a serious threat to the vitality . . . of the historic faiths."³⁸ This is, of course, one of the evils that the First Amendment was designed to prevent, for as the Court observed in Engel, one of the assumptions underlying the Establishment Clause is "that a union of government and religion tends . . . to degrade religion."³⁹

A second objection that is occasionally lodged against Engel and Schempp turns on the notion that the school prayer issue involves a conflict between the Establishment Clause and the Free Exercise Clause, and that the Court did not give sufficient weight to the free exercise interests of those who desire government sponsored prayer in the public schools. This argument, which is offered by the Administration in defense of its proposed constitutional amendment,⁴⁰ was first elaborated by Justice Stewart in his dissenting opinion in Schempp. Stewart argued that "a compulsory state educational system so structures a child's life" that "parents who want their children exposed to religious influences" might not be able adequately to "fulfill that wish off school property and outside school time."⁴¹ Stewart conceded that "parents who wanted their children exposed to religious influences" would have a right under the Free Exercise Clause to "send their children to private or parochial school."⁴² He maintained, however, that this consideration is "too facile to be determinative" because, as the Court had recognized in Murdock v. Pennsylvania, "[f]reedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way."⁴³

There are several answers to this line of argument. First, the argument proves too much. It suggests that even if a state did not operate a public school system, it would nonetheless "remain under an affirmative duty to provide religious education to those children whose parents could not afford to send them to private schools."⁴⁴ Moreover, the argument would seem logically "to compel insistence on state sponsorship" not only of school prayer, but "of the full panoply of denominational instruction available in private schools."⁴⁵

Second, the argument is premised on a misunderstanding of Murdock. There is an obvious difference between the proposition, established in Murdock, that government may not unreasonably tax the exercise of constitutional rights, and the proposition, put forth by Justice Stewart and the Administration, that government must affirmatively subsidize the exercise of such rights. As the Court made clear in Harris v. McRae,⁴⁶ which upheld the Hyde Amendment's limitation on the use of medicaid funds for abortions, to "translate the limitation on governmental power . . . into an affirmative funding obligation" would "mark a drastic change in our understanding of the Constitution."

Third, the school prayer issue cannot fairly be characterized as a conflict between the Establishment Clause and the Free Exercise Clause, for as even Justice Stewart appeared to concede, the refusal of government to sponsor prayer in the public schools would not itself violate the Free Exercise Clause.⁴⁷ What is really at stake, then, is not a clash of constitutional rights, but an effort of government to justify a practice that appears directly to threaten the values underlying the Establishment Clause. As the Court noted in Schempp, there may be circumstances in which such a practice could be upheld because of the nature and strength of the competing government interests. The Court suggested, for example, that government's employment of chaplains to serve members of the armed forces might not be unconstitutional, for in such circumstances "the Government regulates the temporal and geographic environment of individuals to a point that, unless it permits voluntary religious services to be conducted with the use of government facilities, military personnel would be unable to engage in the practice of their faiths."⁴⁸ As the Court recognized, however, that is surely not the case with respect to students in the public schools. Given the many alternatives available, the inability of students to engage in government sponsored prayer in the public schools hardly seems a significant obstacle to their ability "to engage in the practice of their faiths."⁴⁹

The third argument that is occasionally advanced in opposition to Engel and Schempp, and the one relied upon most heavily

by the Administration, is that "the history of the Establishment Clause [does] not support the Supreme Court's conclusion that public prayer in schools is unconstitutional."⁵⁰ In his opinion for the Court in Engel, Justice Black suggested that the result was virtually dictated by the intent of the framers. In fact, it seems fair to say that Black's use of history was somewhat "overdrawn,"⁵¹ for a careful review of the record indicates considerably more ambiguity than Black lets on. This is not to say, however, that the Administration's claim that Engel and Schempp are contrary to the intent of the framers is any less "overdrawn." The plain fact is that, as is often the case, appeal to the intent of the framers yields mixed and frequently conflicting conclusions. There is, quite simply, enough "intent" to support a host of contradictory assertions. The point, of course, is not that history is no guide. It is, rather, that resort to the intent of the framers is a slippery business that must be approached with caution.⁵²

There are essentially three facets to the Administration's historical attack on the Court's decisions. At the most specific level, the Administration maintains that "the framers of the First Amendment did not intend to forbid public prayer."⁵³ To support this contention, the Administration points out, for example, that the First Congress, which drafted the First Amendment, "retained a chaplain to offer prayers" and, "the day after proposing the First Amendment, called on President Washington to proclaim 'a day of public thanksgiving and prayer. . . .'"⁵⁴

There can be no doubt that "the framers of the First Amendment did not intend to forbid public prayer." That, however, is not the issue. For as the Court made clear in both Engel and Schempp, those decisions turned on the very special characteristics of school prayer. In Engel, for example, Justice Black explained that "nothing in the decision reached here . . . is inconsistent with . . . the many manifestations in our public life of belief in God. [Most] patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise

that the State of New York has sponsored in this instance."⁵⁵ Similarly, in Schempp, Justice Clark expressly distinguished the clearly "religious" exercises that were "prescribed as part of the curricular activities of students who are required by law to attend school" from such matters as the inclusion in our oaths of office of the final supplication "So help me God" and the traditional commencement of our legislative and judicial sessions with "an opening prayer."⁵⁶

Thus, that "the framers did not intend to forbid public prayer" generally tells us very little about their intent with respect to the very special problem of government sponsored prayer in the public schools, where the environment is dedicated to the inculcation of values and "where immature and impressionable children are susceptible to a pressure to conform and to participate in the expression of religious beliefs."⁵⁷ Moreover, it seems clear that the framers themselves "gave no distinct consideration to the particular question whether the [Establishment Clause] forbade devotional exercises in public institutions."⁵⁸ This, of course, is hardly surprising, for education as the framers knew it was confined almost exclusively to private schools. Finally, even if the framers had expressed an intent on this question, it is not at all clear that that intent should sensibly control our present understanding of the Clause. For the religious composition of our society and the general structure of American education have changed so fundamentally since the enactment of the First Amendment, that we may be truer to the intent of the framers if we look, not to their specific intent based on their immediate circumstances, but to whether in the light of changed circumstances the challenged practices "tend to promote that type of interdependence between religion and state which the First Amendment was designed to prevent."⁵⁹

The second facet of the Administration's historical attack focuses on the Court's interpretation of the Establishment Clause at a more general level. In attempting to come to grips with the ambiguities of the Clause, the Court has sought guidance

especially in the views of Jefferson and Madison, the original author of the First Amendment.⁶⁰ Indeed, to "anyone conversant with Madison's Memorial of 1785," and with the Court's reliance on Madison's views, the decisions in Engel and Schempp "ought scarcely to have been surprising."⁶¹ The Administration argues, however, that the Court has paid too much attention to the views of Jefferson and Madison and not enough to the views of others who contributed to the framing of the First Amendment. The Administration maintains that a consideration of these other views would lead to an understanding of the Clause considerably narrower than that embraced by the Court.⁶² The Administration's interpretation is not wholly implausible. Nor, though, is the Court's. To the contrary, on any fair reading of the record there is "sufficient historical evidence to justify" the Court's interpretation.⁶³ At best, then, the Administration's contention warrants the traditional Scotch verdict: Not proven.

The final facet of the Administration's historical attack turns, not on the intent of the framers, but on the observation that "there has been a long tradition of including some form of prayer in the public schools ever since their inception."⁶⁴ Although the existence of such a "tradition" might be relevant to constitutional interpretation, it is hardly dispositive. Otherwise, such landmark decisions as Brown v. Board of Education⁶⁵ and New York Times v. Sullivan⁶⁶ would presumably have to go the way of Engel and Schempp. In any event, the "tradition" of school prayer was not nearly as firmly entrenched as the Administration would like to believe. By 1962, a number of states had outlawed school prayer entirely,⁶⁷ and only twenty-two states had actually sanctioned it by statute or judicial decision.⁶⁸

It should be apparent, then, that the decisions in Engel and Schempp are founded upon at least a reasonable understanding of the First Amendment. Indeed, long before these decisions, a number of state courts had embraced similar constructions of analogous state constitutional provisions.⁶⁹ Moreover, of the nine Justices who participated in Engel and Schempp, only one

dissented. The decisions were thus endorsed not only by the so-called Warren Court "liberals," but also by such moderate-to-conservative Justices as Harlan, Clark, and White. And, for what it is worth, the academic commentary has generally been quite favorable.⁷⁰

Perhaps even more important, Engel and Schempp have clearly stood the test of time. Despite dramatic changes in the makeup of the Court, these decisions have never been called into question. To the contrary, they remain important and vital components of the Court's contemporary interpretation of the First Amendment.⁷¹ Engel and Schempp cannot simply be dismissed as aberrant or obviously illegitimate decisions. Those who support the proposed constitutional amendment must thus forthrightly recognize that they seek to overturn not merely two decisions of the Supreme Court, but a central precept of our constitutional jurisprudence.

2

Even if Engel and Schempp were "wrongly" decided, the proposed constitutional amendment still should not be enacted. For the policy underlying the proposed amendment, however well-intentioned, is fundamentally unsound. This is so, not only for the reasons elaborated in Engel and Schempp, but for at least two additional reasons as well.

First, there is the problem of coercion. There is, I expect, virtually universal agreement that government should not compel an individual to recite a prayer or affirm a belief that is contrary to his religious faith. Indeed, such a practice could not be squared with the Establishment Clause, the Free Exercise Clause, or with our traditions as a free society. The Administration recognizes this, for the proposed amendment provides not only that "[n]othing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions," but also that "[n]o person shall be required . . . to participate in prayer."

Although recognizing the right of the individual not to be

coerced "to participate in prayer," the Administration explicitly "rejects the 'implied coercion' theory of [Engel]," and substitutes in its stead what it terms a "[r]easonable accommodation" of the conflicting interests.⁷² That is, focusing on the interests of school children themselves, the Administration concludes that "persons who do not wish to participate in prayer should be excused or may remain silent, but that should not interfere with or deny the rights of others who do wish to participate."⁷³ There are at least two difficulties with this seemingly straightforward analysis. First, as the Court recognized in Engel and Schempp, there are important societal, institutional, and constitutional interests at stake here, interests that go beyond those of the children immediately affected. Second, and more to the point, the Administration's "reasonable accommodation" is too facile -- it is premised upon a naive and unduly simplistic conception of "voluntary" participation.

As the Court noted in Engel, "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."⁷⁴ The problem is especially acute, of course, when the member of the "religious minority" is a child and the "indirect coercive pressure" is brought to bear in the context of the school environment. Social psychologists and sociologists have long observed that children place special "importance on how they are esteemed by their classmates," and the "urge to conform to their classmates' attitudes" can often induce children "to do and say things in accordance with the majority that they are convinced are wrong" and that they would not otherwise do or say.⁷⁵ School prayer poses an especially "cruel dilemma,"⁷⁶ for as a number of state courts have long recognized, "[t]he exclusion of a pupil from [religious] exercises in which the rest of the school joins, separates him from his fellows, puts him in a class by himself, deprives him of his equality with the other pupils, subjects him to a religious

stigma and places him at a disadvantage in the school. . . ."⁷⁷
 Thus, as Justice Frankfurter has explained: "That a child is offered an alternative [to participation] may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to [conform]."⁷⁸

Ultimately, of course, the question turns on what we mean by "coercion." The question is not, however, one of semantics. The answer will not be found in a dictionary. It will be found in the definition, not of a word, but of a relationship -- the relationship of citizen to state in our society. How much pressure is "too much"? The answer depends, not only on the amount of pressure, but on other factors as well: Who is the individual? What is he being "pressured" to do? What competing interests are furthered by the government action that generates the "pressure" to conform?

In the school prayer context, the individual is a child. Moreover, the child is pressured, not to do his homework, but to recite a prayer that may contradict his religious faith. He is pressured, in other words, to do an act that runs counter to our most cherished traditions of individual dignity and religious freedom. And, as already indicated, the pressure to conform in this context, however indirect or unintended, is substantial indeed. The Administration argues, however, that the imposition of such pressure is justified by the government's interest in enabling those who wish to pray in the public schools to do so. I cannot agree. Although recognition of a "dissenter's veto" is always troubling, our historic commitment to religious freedom is founded on protecting the rights of dissenters. Moreover, the government interest said to support the proposed amendment seems attenuated, at best. For given the many alternatives available to those who wish to pray,⁷⁹ the inability to participate in government sponsored prayer in the public schools hardly seems a significant obstacle to the practice of their faiths. The proposed amendment is thus not a "reasonable accommodation."

Before leaving the coercion issue, there are two subsidiary points I should like just briefly to address. First, it is sometimes said that the plight of the nonconforming student should not be given much weight in this context, for "these pressures to conform are part of the normal social pattern and part of the price of being a religious nonconformist is the social stigma which all nonconformists have to bear."⁸⁰ Indeed, the experience of being "set apart" in this manner may be "educational" and perhaps even "desirable."⁸¹ This argument is misguided. Religious and other minorities have enough trouble without government adding to the burden. It is simply not a legitimate function of government "to increase 'the price of being a religious nonconformist.'"⁸²

Second, it is occasionally suggested that to ban school prayer to protect the rights of dissenters would be inconsistent with West Virginia State Board of Education v. Barnette,⁸³ in which the Court held that the State could not constitutionally compel objecting school children to recite the Pledge of Allegiance, without holding that use of the Pledge was prohibited entirely.⁸⁴ The issue here, however, is one of policy, not of constitutional interpretation. In any event, the situations are in fact quite different. "Barnette was a case in which government used its schools to foster an idea -- namely, allegiance to the state -- which lies in the 'secular intellectual' realm. This is the sort of thing the government does all the time, and is fully entitled to do, provided that it does not infringe the individual's right of intellectual nonconformity, religious or otherwise."⁸⁵ School prayer, however, involves a government effort to foster "religious activity," an end forbidden to it by the First Amendment. There is thus no legitimate government interest sufficient to offset the competing interest of dissenters in being free of pressures to conform.⁸⁶

My second objection to the policy underlying the proposed constitutional amendment arises out of the fact that, if enacted, the amendment would authorize not only so-called "nondenominational" prayer, but expressly sectarian prayer as well.

Recognizing the almost insurmountable problems inherent in the formulation and implementation of "nondenominational" prayer, and the likelihood that "[a] limitation to 'nondenominational prayer' might well be construed . . . to rule out virtually any prayer except one practically devoid of religious content," the Administration specifically drafted the proposed amendment so as not to "limit prayer in public schools . . . to 'nondenominational prayer.'"⁸⁷ The Administration was surely right in its understanding of the problems posed by "nondenominational" prayer.⁸⁸ Its cure, however, is even worse than the disease.

As the Court has observed, "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."⁸⁹ In Engel, for example, Justice Black traced the tumultuous history of The Book of Common Prayer, which was created under government direction in England in the sixteenth century and which "set out in minute detail the accepted form and content of prayer and other religious ceremonies to be used in the established, tax-supported Church of England."⁹⁰ As Black explained, the controversies over the Book "repeatedly threatened to disrupt the peace" as competing groups struggled "to impress their particular views upon the Government and obtain amendments of the Book more suitable to their respective notions of how religious services should be conducted."⁹¹ Other groups, "lacking the necessary political power to influence the Government," decided "to leave England" and to "seek freedom in America."⁹² Thus, Black noted, the framers of the First Amendment "knew the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval," and the "First Amendment was added to the Constitution" with this evil in mind.⁹³ The lesson of history, then, is that "competition among religious sects for political and religious supremacy has occasioned considerable civil strife," and what is at stake in Establishment Clause cases is, in part, the prevention of "'that kind and degree of government involvement in religious life'" that "'is apt to lead to strife'"

and to "strain a political system to the breaking point."⁹⁴

The proposed constitutional amendment, by authorizing government sponsored sectarian prayer in the public schools, is likely to produce precisely that kind of conflict and "division along religious lines" that the First Amendment was designed to prevent. Indeed, the religious "strife" generated in this context is likely to be especially severe, for here we deal, not with mere incidental religious differences over essentially secular issues,⁹⁵ nor even with religious differences over secular issues that might differentially affect different religious groups,⁹⁶ but with religious differences over what are in the most fundamental sense religious issues.

The proposed amendment, by authorizing sectarian prayer, would invite endless and no doubt occasionally bitter "disputes over the use of the Old or the New Testament, the version of the New Testament, the choice of texts, the unitarian or trinitarian form of address, and so on."⁹⁷ Moreover, the stakes in such disputes are high. The "winners" receive the imprimatur of government for their faith. The "losers" must face the prospect that their children will encounter the "cruel dilemma" of either reciting a prayer that is contrary to their beliefs or conspicuously remaining silent or leaving the room while their classmates engage in prayer. Like The Book of Common Prayer, the practice authorized by the proposed amendment would intensify religious fragmentation as competing groups struggled "to impress their particular views upon the Government and obtain [prayers] more suitable to their respective notions of how religious services should be conducted." Whether or not such a practice is unconstitutional, it is surely unwise.

There is, moreover, another aspect to this issue. The Court has long and consistently "adhered to the principle, clearly manifested in the history and logic of the Establishment Clause, that no State can 'pass laws which aid one religion' or that 'prefer one religion over another.'"⁹⁸ This is, indeed, the "clearest command" of the First Amendment.⁹⁹ Even Justice Stewart, the lone dissenter in Engel and Schempp, agreed that the

constitutionality of the challenged practices "would be extremely doubtful" if the government designated "a particular religious book" or a "denominational prayer."¹⁰⁰ And even so staunch an opponent of Engel and Schempp as Professor Charles Rice agrees that the Establishment Clause "commanded impartiality on the part of the government as among the various sects of theistic religions."¹⁰¹

The proposed constitutional amendment, by authorizing government sponsored sectarian prayer, directly contravenes this previously unquestioned principle of interfaith neutrality. Let us suppose that the proposed amendment is enacted and that a school board thereafter authorizes the use of a prayer referring specifically to Jesus as "Our Lord." A Jewish student protests, but the school authorities tell him that if he does not wish to participate he may "sit quietly, occupy [himself] with other matters, or leave the room."¹⁰² The student and his parents file suit, claiming that the prayer violates the "clearest command" of the Establishment Clause -- that government may not "aid one religion" or "prefer one religion over another." What is the court to do?

There are at least three alternatives. First, the court might construe the Amendment as authorizing only "nondenominational" prayer. As already indicated, however, even an amendment so limited would pose substantial problems,¹⁰³ and would involve the courts in the awkward task of determining when a prayer is "nondenominational." In any event, such a construction would fly in the face of the intent of the framers, who specifically intended not to "limit prayer in public schools . . . to 'nondenominational prayer.'"¹⁰⁴

Second, the court might hold that although the school board may authorize sectarian prayers, it must do so in conformity with the neutrality principle. What, though, does this mean? Must the board follow an "equal time" policy? How is "equal" to be defined? In terms of the religious composition of the community? If the community is five per cent Jewish, do Jews get to write the prayer one day out of twenty? What if the

Methodists disagree with the Episcopalians who disagree with the Catholics? Should the court insist on a policy of "separate but equal"? The plain fact is that the notion of sectarian prayer is irreconcilable with the principle of neutrality.

Finally, the court might treat the issue as one to be left entirely to the discretion of the local school board. This appears to be the view of the Administration, which states that the proposed amendment "does not limit the types of prayer that are constitutionally permissible and is not intended to afford a basis for [judicial intervention] to determine whether or not particular prayers are appropriate for individuals or groups to recite."¹⁰⁵ This view, if accepted, would render the neutrality principle nugatory and would leave the members of minority faiths at the mercy of the majority. Such a result is directly inconsistent with this nation's long-standing commitment to religious toleration. It should not be enacted into the Constitution.

3

Even if Engel and Schempp were "wrongly" decided, and even if the policy underlying the proposed constitutional amendment were sound, the amendment still should not be enacted. The Constitution of the United States should not be altered merely to "correct" an "erroneous" or "unpopular" decision of the Supreme Court. Such a practice, once established as precedent, may prove too easy to follow and may lead, ultimately, to political and constitutional instability.¹⁰⁶ The Constitution should be amended only with respect to "fundamental matters of constitutional concern" and only when "the necessity and desirability of the amendment" are "clearly demonstrated."¹⁰⁷ This is especially true with respect to the Bill of Rights, which has never been amended and has served us quite well as written for almost two hundred years.

The proposed amendment does not deal with a fundamental matter of constitutional concern. Although the role of religion in our society is of profound importance, the amendment itself

deals only with a marginal issue. It attempts, not to define the relationship of government and religion in any principled manner, but to resolve a narrow, quite specific dispute.

Moreover, the necessity and desirability of the amendment have not been demonstrated. Why should the Constitution be amended to authorize government sponsored prayer in the public schools? What values or interests are threatened by the current state of affairs? Presumably, there is a sense among those who support the amendment that our schools should do more to promote the moral education of the young; that education should strive to instill a sense of morality and reverence in students; and that if the public schools exclude religion they will contribute to the philosophy of secularism. These are legitimate concerns. But are they addressed by the proposed amendment? I think not.

The brief recitation of a prayer in unison in the classroom is hardly likely to contribute significantly to the moral education of the young. It "is at best a feeble and dubious recourse, a deceptively easy way to avoid the real and pressing problems of moral education in the public schools."¹⁰⁸ Nor is the practice of government sponsored prayer a particularly effective means to neutralize the potentially secularistic tendencies of public education. The value of such prayer is more symbolic than real; it is a ritual "apt to be regarded as a slight irrelevance to be got over before the serious business of the day begins."¹⁰⁹

Moreover, the decisions in Engel and Schempp exclude neither religion nor prayer from the public schools. Rather, what they prohibit is officially sanctioned religious activity. They prohibit, not religion, but government's affirmative promotion of prayer and its direct and active involvement in religious expression. Indeed, nothing in any decision of the Supreme Court forbids a student to engage in private, nondisruptive prayer. And as both the Supreme Court and the lower federal and state courts have recognized, Engel and Schempp leave ample room for religion in the school environment.¹¹⁰

It is generally accepted, for example, that a public school may set aside a minute at the beginning of the school day for

"silent meditation or prayer" without running afoul of the Establishment Clause.¹¹¹ Indeed, Gaines v. Anderson¹¹² expressly upheld such a practice. As the court explained, this practice "may serve legitimate secular purposes in aid of the educative function," for a "quiet moment at the beginning of the day would tend to" "still the tumult of the playground and start a day of study."¹¹³ Moreover, such a practice "permits meditation or prayer without mandating the one or the other."¹¹⁴ The effect is thus "to accommodate students who desire to use the minute of silence for prayer or religious meditation, and also other students who prefer to reflect upon secular matters."¹¹⁵ Unlike the schemes in Engel and Schempp, a moment of silence does "not operate to confront any student with the cruel dilemma of either participating in a repugnant religious exercise or requesting to be excused," for "[if] a student's beliefs preclude prayer in the setting of a minute of silence in a schoolroom, he may turn his mind silently toward a secular topic, or simply remain silent, without . . . facing the scorn or reproach of his classmates."¹¹⁶

This practice, which has been authorized in at least twenty-one states,¹¹⁷ embodies a true "reasonable accommodation." Given the availability of this alternative, it is difficult to understand the clamor for a constitutional amendment authorizing government sponsored school prayer. What legitimate government interests are furthered by the schemes invalidated in Engel and Schempp that are not also furthered by setting aside a moment for "silent meditation or prayer"? Is the concern that this practice denies government the power to dictate the terms of the prayer? That it prevents government from monitoring the students' behavior to "make sure" that they actually "pray"? That it reduces the pressure to conform? These concerns are hardly of sufficient weight to merit amendment of the Constitution of the United States. Indeed, and more fundamentally, these concerns are antithetical to the very concept of freedom of religion.

A second possible accommodation of religion with public education concerns the activities of extracurricular student organizations with a religious orientation. Although courts have tended to interpret Engel and Schempp as prohibiting most forms

of student-initiated prayer where the prayer takes place on school property during school hours as a regular and organized part of the school program,¹¹⁸ there is at least one form of organized student-initiated prayer that may well be consistent with the First Amendment.

In its recent decision in Widmar v. Vincent,¹¹⁹ the Supreme Court held that "a state university, which makes its facilities generally available for the activities of registered student groups," cannot constitutionally "close its facilities to a registered student group desiring to use the facilities for religious worship and religious discussion."¹²⁰ In 1977, the University of Missouri at Kansas City, which officially recognizes over one hundred student groups and routinely provides University facilities for the meetings of such groups, refused to permit an organization of evangelical Christian students to meet in University buildings because of a regulation prohibiting the use of University facilities "for purposes of religious worship or religious teaching." The Court, in an eight-to-one decision, held that the University's "exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral."¹²¹

In an effort to justify its exclusionary policy, the University maintained that to permit religious meetings in its facilities would violate the Establishment Clause. Justice Powell, speaking for the Court, rejected the argument that an "equal access" policy would be incompatible with the First Amendment. An "open-forum policy," Powell maintained, would have the secular purpose of enabling students to exchange ideas. Moreover, Powell noted, an "open-forum" policy would involve less government "entanglement with religion" than the exclusionary policy, for it would avoid the need for the University "to determine which words and activities fall within 'religious worship and religious teaching.'"¹²² Finally, Powell held, "the primary effect" of an "open-forum" policy would not be to advance religion. Although conceding that religious groups might benefit from access to University facilities, Powell explained that "a religious organization's enjoyment of merely 'incidental'

benefits does not violate the prohibition against the 'primary advancement' of religion."¹²³ Here, Powell concluded, the benefit was only "incidental," for "an open forum in a public university does not confer any imprimatur of State approval on religious sects or practices," and "the forum is available to a broad class of non-religious as well as religious speakers," thus indicating that the primary effect is "secular."¹²⁴

The potential impact of Widmar on the permissible role of student-initiated religious organizations in public primary and secondary schools remains uncertain.¹²⁵ On the one hand, the Court may extend Widmar with full force, thus according student-initiated religious organizations a right to use school facilities on an equal basis with non-religious organizations.¹²⁶ On the other hand, there may be some reluctance to extend Widmar, for public universities do not historically share "the special place of public schools in American life,"¹²⁷ and, as the Court noted in Widmar, "University students are . . . less impressionable than younger students and should be [better] able to appreciate that the [school's] policy is one of neutrality toward religion."¹²⁸ Thus, the Court may hold Widmar wholly inapplicable to primary and secondary schools.¹²⁹ Perhaps most likely, however, the Court may hold Widmar applicable only in part and thus adopt an "intermediate" approach. For example, the Court might hold that local authorities may either exclude religious organizations from public schools, or permit them to operate on an equal basis with non-religious organizations, at their discretion. That is, neither the exclusion nor the equal inclusion of such organizations would be unconstitutional. Alternatively, the Court might permit student-initiated religious organizations to operate in the public schools, but only in accord with special regulations governing the nature, timing and location of their activities to reduce the dangers of "establishment."¹³⁰ The law on these questions is, at present, in flux. It is no time to amend the Constitution.

Finally, it should be emphasized that nothing in Engel or Schempp in any way excludes the study of religion from the public schools. To the contrary, as the Court observed in Schempp,

"one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization," and the "study of the Bible or of religion, when presented objectively as part of a secular program of education," may "be effected consistently with the First Amendment."¹³¹ Thus, with no embarrassment from the Establishment Clause, public schools may explore the religious and ethical values which illuminate the purposes of our democratic society. It is through this process, and not through the repetitive recitation of a government sponsored prayer, that we will achieve true "moral education."¹³²

Whatever legitimate ends the proposed amendment seeks to achieve are already attainable through other, more reasonable, and more effective means. There is simply no sufficient justification to invoke the solemn processes of constitutional amendment. The proposed amendment is inconsistent with our contemporary constitutional jurisprudence, it is unsound as a matter of policy, and it is unnecessary to achieve its most central objectives. It should not be enacted.

FOOTNOTES

1. 370 U.S. 421 (1962).
2. Brief for the Board of Regents of the University of the State of New York as Amicus Curiae, pp. 14, 15.
3. Record, p. 40.
4. 370 U.S., at 424.
5. Id., at 425.
6. Id., at 428-30.
7. Id., at 425.
8. Id., at 430.
9. Id., at 431.
10. Id., at 430.
11. Id., at 431, 432.
12. Id., at 433.
13. Id., at 436, quoting Memorial and Remonstrance against Religious Assessments, II Writings of Madison 183, at 185-86. Justices Frankfurter and White did not participate in the decision. Justice Stewart dissented.

14. 374 U.S. 203 (1963).
15. Id., at 213, quoting *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).
16. Id., at 213.
17. Id., at 214.
18. Id., at 222.
19. Ibid.
20. Id., at 223.
21. Id., at 225. Justice Stewart dissented.
22. See Kurland, The Regents' Prayer Case: "Full of Sound and Fury, Signifying . . .", 1962 Sup. Ct. Rev. 1, 2-3.
23. See Congressional Research Service, The Library of Congress, Legal Analysis of President Reagan's Proposed Constitutional Amendment on School Prayer 22-25 (June 2, 1982).
24. Message of President Ronald Reagan to Congress, Proposing Constitutional Amendment Relating to School Prayer 34 (May 17, 1982) [hereinafter cited as President's Message].
25. See Kurland, supra note 22, at 25-29.
26. *McGowan v. Maryland*, 366 U.S. 420, 441-42 (1961).
27. See, e.g., *Wolman v. Walter*, 433 U.S. 229 (1977); *Tilton v. Richardson*, 403 U.S. 672 (1971); *Lemon v. Kurtzman*, 403 U.S. 602 (1971).
28. See, e.g., *Lovell v. City of Griffin*, 303 U.S. 444 (1938); *Cox v. New Hampshire*, 312 U.S. 569 (1941); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).
29. *Ambach v. Norwick*, 441 U.S. 68, 76 (1976).
30. *Engel v. Vitale*, supra, 370 U.S., at 430.
31. Rice, The Prayer Amendment: A Justification, 24 S. Car. L. Rev. 705, 710 (1972).
32. The Administration's Proposed Constitutional Amendment Relating to School Prayer 28 (May 17, 1982) [hereinafter cited as Administration Statement].
33. Lardner, How Far Does the Constitution Separate Church and State, 45 Am. Pol. Sci. Rev. 110, 112 (1951), quoted in *Abington School District v. Schempp*, supra, 374 U.S., at 233-34 (Brennan, J., concurring).
34. *Torasco v. Watkins*, 367 U.S. 488, 495 n.11 (1961). See also Cahn, On Government and Prayer, 37 N.Y.U. L. Rev. 981, 993-94 (1962).
35. *Abington School District v. Schempp*, supra, 374 U.S., at 216, quoting *Everson v. Board of Education*, 330 U.S. 1, 26 (1947) (Jackson, J., dissenting).
36. *Torasco v. Watkins*, 367 U.S. 488, 495 (1961).
37. Cahn, supra note 34, at 992.
38. Kauper, Prayer, Public Schools and the Supreme Court, 61 Mich. L. Rev. 1031, 1065 (1963). See also Kurland, supra note 22, at 30-31.
39. 370 U.S., at 432.

40. Administration Statement, supra note 32, at 21.
41. 374 U.S., at 313.
42. Id., at 312-13, citing *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).
43. 374 U.S., at 313, quoting *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943).
44. Pollack, Forward: Public Prayers in Public Schools, 77 Harv. L. Rev. 62, 75 (1963).
45. Ibid.
46. 448 U.S. 297, 318 (1980).
47. See 374 U.S., at 316.
48. 374 U.S., at 226 n.10.
49. See Pollack, supra note 44, at 75; Kauper, supra note 38, at 1054.
50. Administration Statement, supra note 32, at 20.
51. Pollack, supra note 44, at 65. See Kauper, supra note 38, at 1051; Rice, supra note 31, at 710-15.
52. See Kurland, supra note 22, at 22.
53. President's Statement, supra note 24, at 2.
54. Administration Statement, supra note 32, at 1.
55. 370, U.S., at 435 n.21. (Emphasis added.)
56. 374 U.S., at 223, 213.
57. Kauper, supra note 38, at 1046. See Schwengel, The Prayer Amendment: A Rebuttal, 24 S. Car. L. Rev. 723, 730 (1972).
58. *Abington School District v. Schempp*, supra, 374 U.S., at 237-38 (Brennan, J., concurring).
59. Id., at 236.
60. See *Engle v. Vitale*, supra, 370 U.S., at 436; *Everson v. Board of Education*, 330 U.S. 1, 11-13, 16 (1947).
61. Cahn, supra note 34, at 986. Madison's Memorial and Remonstrance Against Religious Assessment is reprinted in full in *Everson v. Board of Education*, 330 U.S. 1, 63-72 (1947).
62. Specifically, the Administration maintains that a consideration of these other views would demonstrate that "the concern the Congress wished to address by the amendment was the fear that the federal government might establish a national church, use its influence to prefer certain sects over others, or require or compel persons to worship in a manner contrary to their conscience," and that "in addressing that concern, Congress did not want to act in a manner that would be harmful to religion generally or would defer to the small minority who held no religion." Administration Statement, supra note 32, at 11-12. In effect, then, this is merely another version of the "neutrality" argument. See text at notes 30-39, supra.
63. Sky, The Establishment Clause, The Congress and the Schools: An Historical Perspective, 52 Va. L. Rev. 1395, 1463 (1966).
64. Administration Statement, supra note 32, at 5.

65. 347 U.S. 483 (1954).
66. 376 U.S. 254 (1964).
67. See State ex rel Finger v. Weedman, 55 S.D. 343, 226 N.W. 348 (1929); State ex rel Dearle v. Frazier, 102 Wash. 369, 173 P. 35 (1918); Herold v. Parish Bd. of School Directors, 136 La. 1034, 68 So. 116 (1915); People ex rel Ring v. Board of Educ., 245 Ill. 334, 92 N.E. 251 (1910); State ex rel. Freeman v. Scheve, 65 Neb. 853, 91 N.W. 846 (1902); State ex rel. Weiss v. District Bd., 76 Wis. 177, 44 N.W. 967 (1890). For a discussion of these cases, see Boies, The Bible, Religion, and the Public Schools 108-32 (1965); Harrison, The Bible, the Constitution and Public Education, 29 Tenn. L. Rev. 363, 386-89 (1962); Note, Bible Reading in Public Schools, 9 Vand. L. Rev. 849 (1956).
68. See Comment, The Supreme Court, The First Amendment, and Religion in the Schools, 63 Colum. L. Rev. 73, 87 (1963).
69. See cases and authorities cited in note 67, supra.
70. See, e.g., Kurland, supra note 22; Pollack, supra note 44; Kauper, supra note 38; Cann, supra note 34; Choper, Religion in the Public Schools: A Proposed Constitutional Standard, 47 Minn. L. Rev. 329 (1963). But see Rice, supra note 31; Griswold, Absolute is in the Dark -- A Discussion of the Approach of the Supreme Court to Constitutional Questions, 8 Utah L. Rev. 167 (1963).
71. See, e.g., Stone v. Graham, 449 U.S. 39 (1980), in which the Court, relying upon Schempp and Engel, held unconstitutional a Kentucky statute requiring the posting of a copy of The Ten Commandments on the wall of each public school classroom.
72. Administration Statement, supra note 32, at 32.
73. Id., at 34.
74. 370 U.S., at 431.
75. Choper, supra note 70, at 344; see also authorities cited therein.
76. Abington School District v. Schempp, supra, 374 U.S., at 290 (Brennan, J., concurring).
77. People ex rel. Ring v. Board of Education, 245 Ill. 334, 351 (1910). See also Herold v. Parish Board of Education, 136 La. 1034 (1915); State ex rel. Weiss v. District Board, 76 Wisc. 177 (1890); State ex rel. freeman v. Scheve, 65 Neb. 853 (1902); State ex rel. Finger v. Weedman, 55 S.D. 343 (1929).
78. Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 227 (1948) (Opinion of Frankfurter, J.). The point is illustrated in Schempp, where the children's father permitted them to participate in religious activities "which were contrary to the religious beliefs which they held," because he did not want his children to be labeled as "odd balls" and "atheistic" and to "have to stand in the hall outside their 'homeroom'" as if they were being punished "for bad conduct." 374 U.S., at 208, 208-09 n.3.
79. See Part 3, infra.
80. Cushman, The Holy Bible and the Public Schools, 40 Cornell L.Q. 475, 495 (1955).
81. Griswold, supra note 70, at 177.
82. Choper, supra note 70, at 347.
83. 319 U.S. 624 (1943).
84. See Administration Statement, supra note 32, at 33-34.

85. Pollack, supra note 44, at 72-73.
86. See id., at 73; Choper, supra note 70, at 348-50; but see Kauper, supra note 38, at 1062.
87. Administration Statement, supra note 32, at 28.
88. See text at notes 37-39, supra.
89. Lemon v. Kurtzman, 403 U.S. 602, 622 (1971). See Meek v. Pittenger, 421 U.S. 349, 372 (1975); Committee for Public Education v. Nyquist, 413 U.S. 756, 795-96 (1973); Walz v. Tax Commission, 397 U.S. 664, 695 (1970) (Harlan, J., concurring); see also Freund, Public Aid to Parochial Schools, 82 Harv. L. Rev. 1680 (1969). For a critical view, see Gaffney, Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy, 24 St. Louis L. Rev. 205 (1980).
90. 370 U.S., at 426.
91. Id., at 426-27.
92. Id., at 427.
93. Id., at 429.
94. Committee for Public Education v. Nyquist, 413 U.S. 756, 796 (1973), quoting Walz v. Tax Commission, 397 U.S. 664, 694 (Harlan, J., concurring). See also Cahn, supra note 34, at 983.
95. See Harris v. McRae, 448 U.S. 297, 319-20 (1980) ("[T]hat the funding restrictions in the Hyde Amendment may coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause.>").
96. See Lemon v. Kurtzman, 403 U.S. 602, 623 (1971) ("Political fragmentation and divisiveness on religious lines are . . . likely to be intensified" when "successive and very likely permanent annual appropriations . . . benefit relatively few religious groups.>").
97. Freund, Statement Relating to School Prayer, Hearings on S.J. Res. 148 Before the Subcomm. on Constitutional Amendments of the Senate Committee on the Judiciary, 89th Cong., 2d Sess. 23, 24 (1966).
98. Larson v. Valente, 102 S.Ct. 1673, 1684 (1982), quoting Everson v. Board of Education, 330 U.S. 1, 15 (1947). See Zorach v. Clauson, 343 U.S. 306, 314 (1952); Epperson v. Arkansas, 393 U.S. 97, 104, 106 (1968).
99. Larson v. Valente, 102 S.Ct. 1673, 1683 (1982).
100. Abington School District v. Schempp, supra, 374 U.S., at 315 (Stewart, J., dissenting).
101. Rice, supra note 31, at 710.
102. Administration Statement, supra note 32, at 32.
103. See text at notes 37-39, supra.
104. Administration Statement, supra note 32, at 28.
105. Ibid.
106. Only three times in our history has the Constitution been amended to "correct" decisions of the Supreme Court. The Eleventh Amendment overturned Chisolm v. Georgia, 2 Dall. 419 (1793), which had held that a State was subject to suit by a citizen of another State; the Fourteenth Amendment overturned Dred Scott v. Sanford, 19 How. 393 (1857), which had held that blacks were not

"citizens;" and the Sixteenth Amendment overturned *Pollack v. Farmers Loan & Trust Co.*, 157 U.S. 429 (1895), which had held an unapportioned direct tax on income to be unconstitutional.

107. Kauper, Statement Relating to School Prayer, Hearings on S.J. Res. 148 Before the Subcomm. on Constitutional Amendments of the Senate Committee on the Judiciary, 89th Cong., 2d Sess. 601, 605 (1966).

108. Freund, supra, note 97, at 25.

109. Ibid.

110. It should be noted that the Administration has significantly overstated the likely impact of the proposed amendment. In describing "judicial rulings restricting school prayer," for example, the Administration notes that, "[i]n one case, for example, a school principal's order forbidding kindergarten students from saying grace before meals on their own initiative was upheld." Administration Statement, supra note 32, at 14, 16. The implication is that the proposed amendment would preclude such a decision. Nothing could be farther from the truth. The issue in *Stein v. Oshinsky*, 348 F.2d 999 (2d Cir. 1965), was not whether the school's decision to allow a prayer violated the Establishment Clause, but, rather, whether its decision to exclude the prayer violated the Free Exercise Clause. The latter issue is not affected in any way by the proposed amendment. Indeed, the Administration's apparent criticism of *Stein* is especially ironic, for the Administration professes that a central purpose of the amendment is "to allow diversity of state and local approaches" and to accord deference to the decisions of "state and local authorities." Administration Statement, supra note 32, at 30, 29. That, of course, is precisely what *Stein* did. The Administration's criticism of *Stein* thus suggests that its real goal is not to foster local control, but to promote prayer. The Administration's analysis of several other decisions is similarly ill-considered. See, e.g., the Administration's discussion of *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), aff'd mem. 102 S.Ct. 1267 (1982). Administration Statement, supra note 32, at 17.

111. See, e.g., *Abington School District v. Schempp*, supra, 374 U.S., at 280-81 (Brennan, J., concurring); *Gaines v. Anderson*, 421 F. Supp. 337 (D. Mass. 1976); *State Board of Education v. Board of Education*, 108 N.J. Super. 564, 574-75, 262 A.2d 21, 26-27, aff'd, 57 N.J. 172, 270 A.2d 412 (1970); *Opinion of the Justices*, 307 A.2d 558, 560 (N.H. 1973); Kauper, supra note 38, at 1041; Choper, supra note 70, at 371; Note, *Religion and the Public Schools*, 20 Vand. L. Rev. 1078, 1092-93 (1967); Comment, *Accommodating Religion in the Public Schools*, 59 Neb. L. Rev. 425, 450-54 (1980).

112. 421 F. Supp. 337 (D. Mass. 1976).

113. Id., at 342.

114. Id., at 343.

115. Ibid.

116. Id., at 345.

117. See Congressional Research Service, supra note 23, at 9 n.24.

118. See, e.g., *Collins v. Chandler Unified School District*, 644 F.2d 759 (9th Cir. 1981) (invalidating prayer at student assemblies sponsored by the Student Council); *Johnson v. Huntington Beach Union High School District*, 68 Cal. App. 3d 1, 137 Cal. Rptr. 43 (1977) (holding that to permit student religious club to conduct its activities on the school campus during the official school day would violate the Establishment Clause). See also *Karen B. v. Treen*, 653 F.2d 897 (5th Cir.

1981), aff'd mem. 102 S. Ct. 1267 (1982); *Kent v. Commissioner of Education*, 402 N.E. 2d 1340 (Sup. Jud. Ct. Mass. 1980); *State Board of Education v. Board of Education*, 108 N.J. Super. 564, 262 A.2d 21, aff'd, 57 N.J. 172, 270 A.2d 412 (1970).

119. 102 S. Ct. 269 (1981).

120. Id., at 271-72.

121. Id., at 278. The Court explained that, "[t]hrough its policy of accommodating their meetings, the University has created a forum generally open for use by student groups," and "to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the University must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." Id., at 273-74.

122. Id., at 275 and n.11.

123. Id., at 276.

124. Id., at 276-77.

125. Prior to *Widmar*, the lower federal courts were divided. Compare *Reed v. Van Hoven*, 237 F.Supp. 48 (W.D. Mich. 1965) (holding that such organizations can meet on school property) with *Brandon v. Board of Education*, 635 F.2d 971 (2d Cir. 1980) (holding that such organizations cannot meet on school property).

126. The essence of *Widmar* is "equality." Any grant of special benefits to religious organizations would thus pose a very different problem. See 102 S. Ct., at 276 n.13.

127. Tribe, *American Constitutional Law* 825 (1978).

128. 102 S. Ct., at 276 n.14.

129. In *Lubbock Civil Liberties Union v. Lubbock Independent School District*, 639 F.2d 1038 (5th Cir. 1982), the court, despite *Widmar*, invalidated a school board policy authorizing "students to gather at the school with supervision either before or after regular hours on the same basis as other groups . . . to meet for any educational, moral, religious or ethical purposes so long as attendance at such meetings is voluntary." In reaching this result, however, the court emphasized the unusual factual background of the case and the fact that the "explicit authorization of religious meetings" arose not out of a general policy concerning student activities, but out of a specific "policy setting forth guidelines on religion in the school." Id., at 1048.

130. See e.g., *Reed v. Van Hoven*, 237 F.Supp. 48 (W.D. Mich. 1965), which sets forth a series of guidelines governing the permissible activities of religious organizations in public schools. See generally *Toms & Whitehead, The Religious Student in Public Education: Resolving a Constitutional Dilemma*, 27 *Emory L.J.* 3 (1978); Comment, supra note 111, at 457-62.

131. 374 U.S., at 225.

132. I have not addressed the question of prayer in "public institutions" other than public schools because the courts have consistently upheld prayers in all other contexts in which the issue has arisen. See, e.g., *O'Hair v. Andrus*, 613 F.2d 931 (D.C. Cir. 1979); *Marsa v. Wernik*, 86 N.J. 232, 430 A.2d 888 (1981). Thus, it is not clear what purpose the proposed amendment might have. Although the Administration cites *Chambers v. Marsh*, 675 F.2d 228 (8th Cir. 1982), that decision focused, not on prayer as such, but on the state legislature's funding of only one chaplain, of one denomination, to offer legislative prayers for sixteen consecutive years. The funding issue presumably would not be affected by the proposed amendment.

PREPARED STATEMENT OF NORMAN REDLICH

My name is Norman Redlich. I am Dean and Professor of Law at the New York University School of Law where I have taught constitutional law for twenty-four years. I have been a member of the New York City Board of Education, and was Corporation Counsel of the City of New York from 1972 to 1974. I am the co-author of a constitutional law case-book which will be published in November of 1982. From 1979 to 1981 I was co-Chairperson of the Lawyers' Committee for Civil Rights Under Law.

Presently, I serve as co-Chairperson of the Commission on Law and Social Action of the American Jewish Congress and I am a member of the Board of Overseers of the Jewish Theological Seminary. I also served on that Seminary's special commission to study the question of the ordination of women in the Conservative Rabbinate. I mention the latter affiliations because while I appear here as a student of constitutional law, and in that capacity oppose the enactment of S.J.R. 199, my views on the subject are motivated in large part by a firm religious commitment. I consider myself a civil libertarian, and have been active in civil liberties and civil rights causes for many years. My opposition to this amendment, however, stems not only from my concern for civil liberties, but my abiding concern for the survival of religious freedom as we have known it in this country.

I recognize that in considering a constitutional amendment, such as is proposed by S.J.R. 199, the issue is not necessarily whether the Supreme Court's school prayer decisions have correctly interpreted the First Amendment, but rather whether, quite apart from that Amendment, religious exercises should be permitted in the public schools. The question, therefore, is not simply correctness of the interpretation of the Establishment Clause, but whether that interpretation, as set

forth in Engel v. Vitale and Abington School District v. Schempp reflects those values and institutions best designed to promote both religion and liberty in this country. Because I believe profoundly in my religious faith, and in the absolute necessity of the government not imposing any religious faith, including my own, on anyone else, I oppose any attempt to tamper with values that underlie the Establishment Clause.

No other country has our commitment to the concept of separation of church and state. There is no country on earth that enjoys the religious pluralism and the religious freedom that has existed here, and there is no country which has been as free from religious strife as has been ours. This happy confluence of constitutional principles and religious liberty is no accident.

There are countries where established religions tolerate other religions; there are countries which are hostile to religions and where religions exist, if at all, by the sufferance of a despotic government and at great peril to those who would profess and practice their faith. To those of you on this committee, who share with me a religious faith, even if not my own, I ask whether you would exchange place in this country with citizens of any other country where principles of our First Amendment do not prevail.

The proposal you have before you does not deal with a fringe interpretation of the Establishment Clause. It deals not with questions of remedial reading taught to parochial school students, nor to the issue whether the singing of Christmas Carols is or is not a religious exercise. It does not concern textbooks or mathematics courses taught in religious schools. Nor does it even purport to establish a religious exercise which is non-denominational, perhaps because sponsors of the school prayer amendment realize that there is no such thing

as a non-denominational prayer. No, this proposed amendment does not deal with peripheral questions under the Establishment Clause. This proposed amendment strikes at the very core of constitutional values that underlie our most precious guarantee of religious and political freedom. This amendment permits an avowedly religious exercise - a prayer - of whatever nature may be approved by the majority in any school district in the country. Whether it be Mormon prayers in Utah, Jewish prayers in Brooklyn, Catholic prayers in Boston, Baptist prayers in Georgia, Congregationalist prayers in parts of New England, religious prayers are to be permitted by this proposed amendment, subject only to the limitation that a person shall not be required to participate in prayer.

Scholars may disagree over the motivation of the Founders in prohibiting religious establishments. I happen to believe that the Supreme Court's interpretation of that history is correct. But even those who may disagree with the Court's view that all aid to religion is prohibited concede that government is not permitted to discriminate among religious sects. Even Justice Stewart, the sole dissenter in Schempp, agreed that school officials could not favor one religion over another. Most Americans conceive it as settled doctrine that religion is a private affair and that government may not favor one faith or the other. In my view, then, this proposal is not a conservative one, but rather a profoundly radical alteration of a basic precept of American life, the required neutrality of government among religious faiths. It will undo one of the proudest achievements of this republic.

It is too often assumed that the free exercise clause is the prime guarantee of religious liberty, that the Establishment Clause is, somehow, hostile to religion, designed to keep religion from becoming too powerful. This

represents a profound misreading of history and a lack of appreciation of the Establishment Clause as itself a prime guarantor of religious liberty. There cannot be true religious liberty - the right of a person freely to choose those forms of religious belief and expression which represent that individual's innermost expression of faith - if the government is permitted to display favoritism to one faith or the other. It is our constitutional theory that the government, which represents all the people, has no business generating the pressure of any religious belief on any individual citizen. The First Amendment command that government make no law respecting an establishment of religion, which this proposed amendment would alter in a most fundamental sense, is an essential feature of a constitutional structure which guarantees that persons can conduct their religious practices, and express their religious beliefs, free from pressure of government conformity.

What is different about this country - what distinguishes it from countries like England or Canada where establishments are permitted - is that in matters of faith we are all equal. I do not wish to be a religious stranger in my own country, and I do not wish any member of any faith to be a stranger in our midst. If there is an official prayer, of one religious denomination, everyone else is a stranger. Catholics in Jewish neighborhoods, or Jews in Catholic neighborhoods, have the right to assume that in this country there are no favorite religions. Take that away, and they become fearful minorities, practicing their faith because of the generosity of the majority. Persons then seek to advance their beliefs, to form coalitions, to protect their religious turf, lest they lose their right to worship. That is the kind of religious strife which the Founders sought to avoid. That concern was specifically articulated by James Madison when he wrote his remarkable document, the Memorial and Remonstrance against

Religious Assessments, which was the intellectual forerunner to the Establishment Clause.

There is no merit to the claim that religious freedom is adequately protected by the language in this proposed amendment which prohibits requiring persons to participate in prayer. Stamping the imprimatur of government on any religious exercise is coercive. One does not solve the problem of coercion by stating that the person does not have to participate in prayer. As religious groups opposing this amendment have stated forcefully in their testimony, the evil comes from being part of a minority which does not participate in a ceremony which the government has established as the majority's will.

Nor is there merit to the claim, raised in almost every school prayer case, that the prohibition on publicly recited or officially chosen prayer violates the free exercise rights of those children who wish to pray. The Supreme Court has never held that students may not, on their own, recite prayers, say grace before or after meals, silently pray at the start of the day, or before exams, or before football games. Moreover, I think that former Chief Judge Irving Kaufman of the Second Circuit Court of Appeals was clearly correct in suggesting, in Brandon v. Board of Education, that, if a student can show that his or her religion requires prayer at set times, he or she must be permitted to do so. What is left of this free exercise claim, therefore, is that the clause somehow demands that students and teachers be permitted to invoke the authority of the state to promote their religion vis-à-vis others. That is not free exercise; it is precisely the evil which the Establishment Clause seeks to forbid, and it is precisely that which this amendment seeks to undo.

Let us think together for a moment about the role a written Constitution plays in a democratic society. The study of

the American Constitution has been the principal focus of my professional life. The Constitution, if it does nothing else, must place certain limits on majority will. It is a profound truism that ours is a government of limited powers. To protect the rights of the states, Congress may not legislate in certain areas. And to protect certain rights of the people, the original Constitution limited the powers of both Congress and the states. The Bill of Rights, whose promised existence was necessary for ratification, imposed broad limitations on the power of the federal government. Constitutional scholars have debated at length particularly in recent years, the issue of the appropriate limitations which the Constitution, through the courts, may impose on democratic majorities. But I believe that virtually all constitutional scholars would agree that if there be one necessary limitation on majority will, it should be in those areas covered by the First Amendment, namely freedom of speech, assembly, petition, expression. These represent the basic fabric of democratic structure, of representative government. They should not be impaired merely because a majority, at any particular moment, wishes to impose its will.

Religious freedom is not simply a peripheral right placed in the First Amendment by accident. No portion of the First Amendment concerned James Madison more than the religion clauses. The founders recognized that political freedom and religious freedom always go hand-in-hand. Totalitarian governments either establish one religion, do away with religion, or subvert religion. The reason is that freedom of religion as we know it in this country, which includes the right to practice one's religion free from any imposed official faith, carries with it the recognition that there is an authority that the government cannot control. It is not surprising, upon reflection, that one of the demands of Solidarity in Poland was that the Catholic

Mass be televised. Communist states will always be at war with religion because the one thing that a Communist state cannot tolerate is the notion that there is an institution people can believe in, and which the government cannot control.

The religion clauses of the Constitution, therefore, are an essential element of the fabric of political democracy. It is not by accident that the First Amendment begins with the words, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." As the courts have expanded the protection of both the Free Exercise and Establishment Clauses, this country has enjoyed an increasing degree of religious freedom and peace. This proposed amendment seeks to undo all of the essential values that underlie the religion clauses. It permits the favoring of one religion over another; it permits the favoring of religions generally; and, despite its language and the intention of its sponsors, it necessarily sanctions coercion against religious minorities.

In recognition of the fact that the Bill of Rights has served this country well by protecting unpopular minorities against the abuses by transient majorities, over 500 professors of constitutional law and practicing attorneys, including almost all of the most prominent constitutional scholars in this country, have signed a statement which is appended to my testimony, urging that this amendment not be adopted.* I wish to quote here what I believe to be the essence of that statement:

"American liberties have been secure in large measure because they have been guaranteed by a Bill of Rights which the American people have until now deemed practically unamendable. If now, for the first time, an amendment to 'narrow its operation' is adopted, a precedent will have been established which may prove too easy to follow when other controversial decisions

*The list containing signatures of over 500 professors of constitutional law and practicing attorneys urging that the amendment be not adopted is on file with the Committee on the Judiciary.

interpreting the Bill of Rights are handed down. In the past, the Court has construed the provisions against infringement of the free exercise of religion and speech and assembly, or securing the privilege against self-incrimination, or requiring fair trial procedures, in a manner deemed by many at the time to be unduly restrictive of the proper powers of government. It is certain that it will do so again in the future. If the first clause of the Bill of Rights, forbidding laws respecting an establishment of religion, should prove so easily susceptible to impairment by amendment, none of the succeeding clauses will be secure."

Constitutions are not written in stone; nor does history always provide an absolute answer to new constitutional issues. Courts, as we know, perform the interpretative role in this country. From time to time we have all disagreed with judicial interpretations of constitutional provisions. But before we take the drastic step of amending a core provision of our constitutional framework - the Establishment Clause - by overturning a court decision interpreting that clause, it is incumbent on all of us, including those who may disagree with the interpretation, to ask whether that interpretation is so inconsistent with the underlying values which gave rise to the constitutional provision as to warrant the drastic step of changing the Bill of Rights.

That the Establishment Clause was designed to prevent the government from composing prayers or other religious exercises is, in my view, irrefutable. That the Clause was designed to prevent coercion on the basis of religion is, in my view, irrefutable. That the Clause was designed, at a minimum, to maintain government neutrality among religions is, in my view, irrefutable.

Some may think that in the school prayer decisions the Supreme Court carried these principles too far. If so, the most that can be said is that the Supreme Court, like

Othello, loved our constitutional values not wisely, but too well. I believe that the Court loved both wisely and well. Surely, excessive concern with religious freedom is not a vice to be corrected; rather it is a virtue - to be praised by most and tolerated by all.

I urge the rejection of this proposed amendment.

Appendix to testimony of Norman Redlich

OUR MOST PRECIOUS HERITAGE

Our Bill of Rights is America's most precious heritage. For a century and three-quarters it has spread the mantle of protection over persons of all faiths and creeds, political, cultural and religious.

Under our system, special responsibility for the interpretation and application of the Bill of Rights rests with the Supreme Court. In discharging this responsibility the Court has from time to time handed down decisions which have aroused considerable controversy. Some of the decisions have been subjected to strong criticism and even condemnation. There have, no doubt, been decisions which have been deemed by a majority of the American people to have been unwise, either in the conclusion reached by the Court or in the manner by which that conclusion was reached.

It may be that the Court's decisions against state-sponsored prayer in the public schools belong in this category. We are, nevertheless, convinced that it would be far wiser for our nation to accept the decisions than to amend the Bill of Rights in order to nullify them.

We recognize that the Constitution provides for its own amendment, and that no provision of it, including the Bill of Rights, is immune to repeal or alteration at the will of the people expressed through the medium of constitutional amendment. Yet, it is relevant to recall in this respect the concluding paragraph of Thomas Jefferson's great Virginia statute for Establishing Religious Freedom:

"And though we well know that this assembly, elected by the people for the ordinary purposes of legislation only, have no power to restrain the acts of succeeding assemblies, constituted with powers equal to our own, and that therefore to declare this act to be irrevocable would be of no effect in law, yet we are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present, or to narrow its operation, such act will be an infringement of natural right."

American liberties have been secure in large measure because they have been guaranteed by a Bill of Rights which the American people have until now deemed practically unamendable. If now, for the first time, an amendment to "narrow its operation" is adopted, a precedent will have been established which may prove too easy to follow when other controversial decisions interpreting the Bill of Rights are handed down. In the past, the Court has construed the provisions against infringement of the free exercise of religion and of speech and assembly, or securing the privilege against self-incrimination, or requiring fair

trial procedures, in a manner deemed by many at the time to be unduly restrictive of the proper powers of government. It is certain that it will do so again in the future. If the first clause of the Bill of Rights, forbidding laws respecting an establishment of religion, should prove so easily susceptible to impairment by amendment, none of the succeeding clauses will be secure.

A grave responsibility rests upon the Congress in taking this "first experiment on our liberties." Whatever disagreements some may have with the Prayer decisions, we believe strongly that they do not justify this experiment. Accordingly, we urge that Congress approve no measures to amend the First Amendment in order to overrule these decisions.

PREPARED STATEMENT OF PAUL BENDER

My name is Paul Bender. I am Professor of Law at the University of Pennsylvania Law School. I thank the Chair and the Committee for inviting me to present my views on the merits of S.J. Res. 199, which would propose, as an amendment to the Constitution of the United States, the following Article:

"Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any State to participate in prayer."

In my opinion, this Amendment, in its present form, should not be added to our Constitution.

The primary purpose of the proposed Amendment, as set forth both by the President, in his message to Congress of May 17, 1982, and by Deputy Attorney General Schmults, in his Statement to this Committee on August 18, 1982, is to overrule two Supreme Court decisions dealing with school prayer: Engel v. Vitale, 370 U.S. 421 (1962), and Abington School District v. Schempp, 374 U.S. 203 (1963). The principal difficulty with the proposed Amendment, however, is that its potential effects would far exceed the overruling of these cases. Whatever their views on the merits of the Engel and Abington decisions, I think that most Americans would find the broad religious authority conferred on local school boards by the proposed Amendment to be quite incompatible with our strongest constitutional traditions.

The Engel case involved a very simple prayer * that was, in fact, not substantially different in language and content from the statement in the Pledge of Allegiance that this is a nation "under God," from the well-known official

* The text of the prayer involved in Engel was as follows:

"Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."

motto "In God We Trust," or from the Supreme Court's own recognition, in Zorach v. Clauson, 343 U.S. 306 (1952), that "We are a religious people whose institutions presuppose a Supreme Being." The Abington case involved the reading of the Lord's Prayer -- perhaps the most widely known prayer in the United States -- and the further reading, without comment, of verses from the Bible selected by individual students. As you know, the Supreme Court, with only Justice Stewart dissenting in each case, held even these relatively non-denominational exercises to be in violation of the Establishment Clause in the public school classroom setting.

The present proposal would authorize religious exercises far more specifically denominational in tone and substance than these involved in Engel and Abington. Indeed, as Deputy Attorney General Schmults pointed out in his statement to you on August 18 (p.10) the proposed Amendment does not in any way "limit the types of prayer that are constitutionally permissible."

If the present proposal were added to the Constitution, many school districts might seek to utilize only prayers of the type struck down in Engel and Abington. Under the proposed Amendment, however, any school board would also have the constitutional authority to utilize much more denominational language in school prayers -- language that might not only lend direct governmental support to the views of a particular denomination or sect, but that also might well directly conflict with, and even be affirmatively offensive to, the religious beliefs of many citizens, including those with children in school. I should further note, in this connection, that the language of the proposed Amendment specifies that "Nothing in this Constitution shall be construed to prohibit" school and other public institutional prayer. The effect of the Amendment would therefore not be limited to barring Establishment Clause attacks on school

prayers, but would apparently prevent any constitutional attack whatever on such prayers, even under provisions such as the equal protection clause and the freedom of speech provisions of the First Amendment. Particular school boards would therefore be authorized to choose prayers that might not only be deeply religiously offensive to many citizens, but that might also contain language that might be racially or politically offensive as well.

The proposed Amendment contains no apparent limit on the source, the doctrinal narrowness or specificity, the length or complexity, or the subject matter of school prayers that may be utilized by local school boards throughout the United States. I cannot believe that it would be a wise step to amend the Constitution to authorize the violations of our anti-establishment tradition that would almost certainly occur as a result of this change.

I am troubled by the proposed Amendment in another way. No matter how "non-denominational" the prayer ultimately adopted by a local school district under the proposed Amendment, and indeed even in districts that ultimately adopt no prayer at all, the result of the adoption of the Amendment is bound to be that religious issues become seriously entangled with governmental policy and many forms of local political activity. The issues of whether or not to adopt an official school prayer and, if so, which particular prayer to adopt, will become issues for governmental decisionmaking, upon which governmental officials will be required to take positions. Candidates will be elected or defeated for public office because of their positions on these issues. Again, I cannot believe that it would be wise to amend the Constitution to authorize -- and in effect to encourage -- this deep level of entanglement between church and state in local communities throughout the United States.

Are there strong affirmative reasons supporting the proposed Amendment? I think not. The President, in his message to Congress, suggested that, without the proposed Amendment, there presently exists a total "bar to school prayer" within the United States. I disagree. Individual students and teachers are certainly constitutionally protected today if they wish to engage in individual silent prayer in school. I should think that they ~~were~~ also protected in many situations where they wished individually to pray aloud, so long as undue disturbance to other activities was not created. There is, in addition, no reason in my view to conclude that a time during the school day for silent meditation or prayer could not constitutionally be set aside by any school district that wished to do so. The Supreme Court, moreover, recently decided by an 8 to 1 vote that a state university was required to afford a student prayer group the opportunity to engage in spoken group prayer in university facilities. Widmar v. Vincent, 50 U.S.L.W. 4062 (1981). It is not yet clear whether, and in what circumstances, the Supreme Court may apply this decision to public secondary and elementary schools.

The only school prayer that Supreme Court decisions to date has clearly prohibited is officially prescribed prayer. But the proposed Amendment's authorization, without limit, of such officially prescribed prayer, as I have discussed above, poses monumental dangers of wholly inappropriate violations of strong traditions in the United States against official religion at any level of government, and against unnecessary entanglement of government with religious issues. Given the ample present opportunities for group prayer outside of school, and for individual and perhaps even unofficial group prayer inside school, there seems to me to be little if any warrant to amend the Constitution so as to create these serious dangers.

PREPARED STATEMENT OF WILLIAM W. VAN ALSTYNE

The proposed amendment to our Constitution reads as follows:

Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any State to participate in prayer.

Accompanying the proposed amendment is a thirty-four page explanation, captioned "Analysis," as part of the President's submission of May 17, 1982. The Analysis makes clear that the following consequences are contemplated under the proposed amendment:

1. "Individual or group prayer" is inclusive of denominational and sectarian prayer (and denominational and sectarian scriptural, devotional recitation) incorporating the religious beliefs of one sect in preference to other sets of religious belief. (p. 28).

2. Such prayers may be composed under governmental auspices and may be enacted for exclusive use as prescribed by government. (pp. 29-31).

3. Such government-composed, sectarian religious exercises may be prescribed for use in any public institution including, but not limited to, schools (at which attendance is compulsory), legislative assemblies, courts, public offices, and any other public facility operated under governmental auspices. (p. 31).

4. The determination of the content and requirement of such prayer is to be a function of that level of government otherwise having legislative power to prescribe the conditions of operation for the public school or other public institution.

5. A person shall be deemed as not being "required" to participate assuming only that no penalty as a matter of official sanction is attached insofar as, during the performance of the government-prescribed, sectarian religious devotional exercise, they merely "sit quietly, occupy themselves with other matters, or leave the room." (p. 32).

6. Prior interpretations of the first amendment by the Supreme Court are no longer to apply; neither the first amendment nor any other part of the Constitution is hereafter to be construed as restraining any acts or involvement of government in the arrangements made according to the scope of this amendment as described above.

My misgivings about this proposed amendment can be summarized as follows:

1. The amendment will abandon the existing constitutional protection from sectarian conflict by providing political incentives for competing religions to establish their theology to the exclusion of others in our public institutions;

2. The amendment will encourage the establishment of a dominant religious creed at the national level under official government sponsorship, establishing a particular religion as the religion of the United States; and it will encourage the establishment of other religions as the official religion of each state and community in which a sufficient majority or coalition exists to secure the enactment of that religion under law;

3. The amendment will encourage the behavioral conditioning of captive audiences by the technique of ritual, repetitive, group recitation of dominant sectarian theology, under controlled circumstances of compulsory attendance of the young, reinforced by official government sanction, the regular use of government premises, the regular involvement of government-employed figures of authority, and implicit disapproval of nonconforming beliefs.

4. The amendment invites political and religious conflict between local majorities that may enact religious rituals in local public institutions offensive to the sectarian preferences of different majorities controlling in legislative bodies having the power to supplant the locally-dominant religion with a state-dominant religion.

5. The amendment may (and probably would) enable Congress to

influence both (a) whether a state or local government shall provide for religious ritual, and (b) the acceptable character of such religious ritual that a state or local government must accommodate, by utilizing its combined powers of taxation and of spending to condition the availability of federal largesse upon the willingness of state and local governments to provide for that minimum of "voluntary prayer" as the national government otherwise resolves to provide in its own facilities.

6. The amendment embraces a constitutional theory of religious combination with government power that may necessarily affect Supreme Court interpretations of the first amendment in matters additional to prayer and scriptural recitations in public institutions. I.e., its open departure from a minimum theory of "neutrality" at least among all "religions" creates an intolerable inconsistency with current first amendment doctrine in general.

7. The amendment is compromising to the privacy and intensity of diverse religious creeds within the United States by subjecting each religion to the political imperative of compromising its own integrity as a necessary concession to secure government support.

8. The amendment would install in our Constitution the principle of theocracy, i.e., the theory that it is appropriate for governments to determine the theological foundation of the nation state and to incorporate that theology among its governing powers.

These several objections are serious and fundamental. I am grateful for this opportunity briefly to explain them.

Our Constitution (which is literally the oldest, written, continuously-operating constitution in the world) currently contains two provisions which explicitly deal with "religion." Both of these provisions are radically unlike the proposed amendment. The first is the only provision in the original Constitution of 1789 to mention religion at all. It is the provision in Article VI, Clause 3, that provides:

[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

This clause separates the secular from the theological. It not merely forbids the use of some particular "religious test" for holding office, e.g., a test restricting office-holding to Protestants. Rather, it declares that there shall be no religious test at all. It makes clear that the "religiousness" of an individual is not the proper object of governmental inquiry in determining his or her qualification to any Office or any public trust under the United States. The sentence that precedes it in Article VI provides, moreover, that even in affirming a mere willingness to support the Constitution (as a condition of holding state or federal office), the act of swearing to an "oath" cannot be required.

The other provision in the Constitution dealing with religion is that which opens the first amendment:

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.

In contrast with the tenor of Article VI, and in contrast explicitly with the language of the first amendment, the proposed amendment would invest a power in Congress to make laws respecting the establishment of whatever religion Congress prefers, in the regular operation of any federal institution. It similarly proposes to authorize each state to establish the religious practice of a dominant majority, in the regular operation of any state or local government institution. Such accommodation as the amendment provides to others is merely that of withholding any punishment from them insofar as, without disruption, they remain silent or leave the room at such times as the government's preferred religious service is being conducted.

The materials accompanying the amendment aver that the amendment means to respect a benign neutrality among religious creeds in the United States. But the examples of what Supreme Court decisions would be overruled, and specifically what practices would be allowed, flatly belie that claim. What is to be approved here is not neutrality, but

the power to impose whatever exclusive religious ceremony as wins out in legislative competition for that privileged status: whether orthodox Catholicism throughout one school district irrespective of the diverse faiths of others in compulsory attendance at such schools, orthodox Islam throughout another in which the Koran and Islamic forms of prayer may reflect the school board's will; strictly Mormon in another jurisdiction; or some compromised variety of Protestantism in such public institutions whose religious devotional exercises shall have been prescribed by that majority. At the national level, in such public facilities as are subject to the legislative jurisdiction of this Congress, the amendment will grant to this Congress the power to establish a single national religious liturgy for regular and exclusive group recitation in all federally operated public institutions.

The materials accompanying the amendment also aver that the amendment means merely to "accommodate" the purely private, i.e., individual, exercise of religious faith. But the examples of what Supreme Court decisions would be overruled, and specifically what practices would be allowed, flatly belie that claim as well. What is to be approved here is not "accommodation," but prescription. It is not the arrangement of public business to accommodate those who wish to attend the church of their choice or to attend places of instruction provided by churches of their affiliation -- accommodations already allowed under law. Neither is it the special accommodation of tax exempt status accorded neutrally to all religiously-held-and-used property, as already exists. Neither is it the accommodations widely already existing under state laws that excuse Sabbatarians from ceasing business on a given day if, as a consequence of religious obligation, they are already obliged to close on a different day. Neither is it the accommodation already provided by Act of Congress excusing any person, bound by religious objection, from military combatant training and combatant service. All of these accommodations and others are already provided and allowed under the first amendment. (Certain other accom-

modations are not merely permitted by the first amendment, moreover, but are already required by force of its free exercise clause.)

The proposed amendment is no "accommodation" in any of these senses. Rather, it contemplates that specific, governmentally-preferred religious prayers and specific, governmentally-preferred religious scriptures, may hereafter be enacted for institutionalized government religious ceremonies in any or in all government facilities.

An egregious example of what this amendment portends is provided by the case of Engel v. Vitale, which the accompanying materials declare explicitly it is the object of this amendment to overrule. The case involved a prayer composed by a state government agency. The "Regents Prayer" (as it was called) was alone authorized for use in the public schools; no other was to be permitted. Its use was to take place in public school classrooms, for the organized, chorused, oral, group recitation of its provisions as a devotional exercise each day (as wholly distinct from studies about prayer, and as wholly distinct from the study of various scriptures in history or in literature courses). The contents of the prayer and the prescribed formula for its devotional use elected all of the following distinctive religious preferences as implicitly reflecting the "correct" religion. There is, within this list of characteristics that were governmentally-selected, governmentally-drafted, and governmentally-adopted for use in governmentally-operated public schools, not one element that is "neutral" or "common" to the religious diversity of the New York school public school population. These were the implicit and explicit sectarian statements involved in Engel v. Vitale, as authoritatively determined by the state government's Board of Regents:

1. The appropriate form of praying is to do so orally, in unison with others, in a secular place, from a standing position, under the guidance of a public school teacher;
2. The appropriate object for which one should pray is to invoke divine blessing for: (a) one's country; (b) one's teachers [under whose direction the prayer is being recited]; and (c) one's parents;

3. The proper relationship of human beings to an immanent spiritual force is one of dependence and of supplication; specifically, what one does in prayer is to "beg";
4. The subject of divine supplication is a unitary, immanent, metaphysical presence, i.e., a single and singular "God";
5. The essential characteristic of this singular "God" is that it is absolutely powerful, i.e., "almighty."

The Regents prayer, involved in the Engel case, is fraught with irony. The "prayer" was rightly criticized by some on the basis that it was a tepid, watered-down compromise -- that it tended to dilute genuine religious expression as a necessary condition of achieving sufficient political support. And, of course, the criticism is essentially well taken. At the same time, however, the Regents prayer was not merely sectarian; it was also strongly offensive to a number of deeply held faiths. The manner of its utterance (aloud, in unison, in a secular place) is offensive to certain faiths; its stipulation of one god is offensive to polytheisms; its stipulation of omnipotence in a single god is blasphemous to other religions which reason differently; they are unable to impute the world's diseases, its wars, its recurring cycles of poverty, famine, and mass death, to a single deity absolutely powerful to end these tragedies. And, that the devotional allegiance of young, impressionable children would be enlisted by the New York Regents to "beg" blessings for the state's own agents (its teachers), moreover, shows how slippery is the gentle slide when the state seizes the instruments of religion to cultivate its own secular interests.

A subsequent case, which the materials accompanying the proposed amendment likewise state will be overruled by the amendment, merely confirms this same point. Here (in Schempp), the government-directed, public school devotional was drawn as daily passages from "The" Bible. That any chapter would have to be explicitly sectarian was obvious (New Testament? Old Testament?). That any edition would be sectarian was equally obvious (King James edition? Vatican-approved edition?). That "The" Bible would certainly not be The Koran, The Bhagavad Gita,

The Upanishad, or The Book of Mormon, etc., etc., merely italicized the implicit involvement of the school system and of its teachers in the sectarian processes of invidious preference.

In brief, there is a pretense in the amendment that it is simultaneously possible for public authority to determine the content of religious exercises to be conducted under its auspices and yet remain "neutral" among all sects otherwise entitled to equal protection consistent with the free exercise clause. The fatuousness of that assumption is at the heart of the Supreme Court's own decisions to the contrary. It is also at the heart of the first amendment which withdraws from government the prerogative to make such dangerous, divisive, and demoralizing choices.

In Engel, Mr. Justice Black very soundly observed:

[I]t is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by government.

And in Schempp, Mr. Justice Goldberg noted, with Mr. Justice Harlan's complete concurrence:

The practices here involved do not fall within any sensible or acceptable concept of compelled or permitted accommodation and involve the state so significantly and directly in the realm of the sectarian as to give rise to those very divisive influences and inhibitions of freedom which both religion clauses of the First Amendment preclude. [The] pervasive religiosity and direct governmental involvement inherent in the prescription of prayer and Bible reading in the public schools, during and as part of the curricular day, involving young impressionable children whose school attendance is statutorily compelled, and utilizing the prestige, power, and influence of school administration, staff, and authority, cannot realistically be termed simply accommodation, and must fall within the interdiction of the First Amendment.

These observations were absolutely sound when they were written. They are equally correct today. Respectfully, I am amazed that this Congress would seriously consider the deliberate insertion of sectarian religious devotional exercises in all public institutions as a proper and desirable object of an amendment to our Constitution.

But this amendment will also do more than sponsor acrimony and sectarian competition at levels of local government now spared that

distress. It must necessarily invite equivalent rivalries among units of state government and, finally, between the national government and the several states. That it would do so within a state can readily be forecast, as follows.

The amendment and its accompanying analysis are clear in asserting that no state need provide for any particular religious services in its public schools or public institutions. Rather, it is, in the first instance, within the determination of each state (and each state's constitution) as to what practices, if any, shall be provided. Suppose, then, that in the local school district of a state (which state is dominated by a "conventional" religious majority), the local board first prescribes an exclusive, daily prayer that is regarded as both unwise and dangerous at the state legislative level? -- A "prayer" requiring that one prostrate oneself on the floor, for instance, facing east; a prayer rendering an appeal not to "God" but to "Allah;" a prayer not begging blessings on one's teachers, but strength for Islam as the one, true faith? The amendment contemplates the prerogative of each "local community" to fashion this kind of choice in the first instance. And, again, the choice is not to be faulted merely because it is (necessarily) sectarian. But, of course, a different sentiment prevailing in the state's legislature, the state may enact a prohibition against such an (unwise?) prayer; and similarly, as in Engel, it may draft a completely different prayer that must be used, if any is to be used, in lieu of the local preference.

The rich, divisive possibilities do not end here. Congress, the amendment provides, may formulate the policy (and thus the range, character, and content) of religious recitation to be employed devotionally and exclusively, in such "public institutions" as are subject to its jurisdiction. Once that power is invested in Congress, there is no restriction upon Congress's recommending the national policy for such states and local communities as themselves are willing to adopt it. Additionally, there is no constitutional barrier against a deci-

sion by Congress to condition the availability of federal financial assistance upon each state's willingness to conform to the national policy respecting group prayer.

In brief, if this Congress believes that a certain prayer is a good and desirable thing for state universities and state public schools to provide, it may (with uniform precedental support from a very long series of Supreme Court opinions) restrict eligibility for its assistance to such state universities and state public schools as can and will provide for such "voluntary . . . group prayer" as Congress believes to be in the national interest. There is no novelty or improbability in this (unanticipated?) use of congressional power if this amendment passes. A state need not now provide for any course providing military training in its state universities; but it is familiar learning that a state that does not see fit to provide for ROTC courses agreeable to federally-described standards disables its state universities from remaining eligible for significant amounts of federal fiscal assistance. We have seen the formula at work with respect to public schools as well as all other state institutions. The modification of state and local laws, to provide for such "affirmative action," or such assistance to the handicapped, or such conditions of employment as Congress believes appropriate for the general welfare, in the spending of federal monies, we know can be compelled by Congress. The established theory is that, consistent with the tenth amendment Congress cannot direct these changes obtusely. It may, however, confine the availability of federal largesse to such states as will in fact "voluntarily" alter their laws (including where necessary their constitutions) to permit compliance with the national policy. So it follows, if this amendment becomes part of our fundamental law. A further erosion of federalism is contemplated here, enabling this Congress to withhold assistance to states that may, under their own constitutions, want no part of providing for

"voluntary prayer" in the operation of its public schools or other public institutions.

This proposed amendment thus does in fact install the first seeds of theocracy into our government institutions. Under the false auspices of religious solicitude, it contemplates all levels of government becoming involved in the determination and prescription of religious exercises in tax-financed, compulsory public education and in any other public (i.e., government) institution. It supposes a benign harmlessness about what is involved here. It imagines that spirited discussion and moderate democratic institutions can work out congenial prayers, acceptable scriptural readings, and an agreeable liturgy of a mild, uncontroversial, state-sponsored religion. It yields to the frustration of various sects that believe they have a missionary purpose to harness the power of secular government in the propagation of (their) faith. And our Supreme Court has rendered itself a scapegoat of these interests by clinging so obstinately to its view that this is not the nature of our Constitution: that the assimilation of religion within the state threatens the civil polity even as it begins, inevitably, to degrade religion as well. My belief both professionally and as a citizen is that the Court's vision is vastly more clear-eyed and entirely more sound than what is proposed here. I hope you will not approve this amendment.

Senator SPECTER. Thank you very much, gentlemen, you have given us amendments, prepared statements, and as Dean Sandalow has said, it is specific policy and unlike the court, we will move it along.

[Whereupon, at 5:03 p.m. the committee was adjourned.]

APPENDIX

ADDITIONAL STATEMENT FOR THE RECORD

STATEMENT OF RENEY K. SMITH

I am deeply concerned with the issue of prayer in public schools. My research in this area has led me to conclude that there were two predominant positions taken by the Framers of the First Amendment, with regard to the meaning and intent of the religion clauses of that Amendment. As a matter of legitimacy, I believe that, in resolving its questions in the Church-State area, the Supreme Court should remain within the parameters of at least one of those historical views.

For the purposes of this statement, I will refer to one of those positions as the "Story" view and the other position as the "Madisonian" view. Essentially, Justice Story maintained that the Framers of the First Amendment intended to promote generalized or nondenominational Christianity, while merely tolerating the religious activity of other "non-Christian" sects. James Madison, on the other hand, insisted that the free exercise of one's religion constituted an inalienable right that government could regulate only when its own survival would be "manifestly endangered" if it failed to regulate the religious exercise in question. Furthermore, while Madison rejected the Story view that the First Amendment implicitly recognized nondenominational Christianity as the national religion, he did not advocate a strict separation of Church and State. Rather, he believed that government could and should facilitate the free exercise of religion even in the public sector, provided that the promotion of religious exercise by government was effectuated in a nonpreferential

manner (i.e., no religious sect or group of sects was to be preferred by government over any other religious group) and that the government did not adopt any specific religious doctrine or mode of worship as its own. These views will be clarified as I outline their subjective historical roots and as I apply them to the Equal Law and the President's proposed Voluntary Prayer Amendment.

Effectively, the Supreme Court has rejected the Story view, while maintaining a precarious fidelity to the Madisonian view. However, one of the lower federal courts, have repudiated both the Story and the Madisonian views, with regard to the public prayer issue, and have displaced these views with their own, more rigid, position. If the Supreme Court follows suit and ignores the applicable constitutional history, an amendment to the Constitution would certainly be justified. However, until the Supreme Court rejects the Madisonian view, as related to the prayer in public schools issue, a prayer amendment would be premature.

Obviously, to explain my views regarding this controversial subject, it will be necessary to give at least a brief outline of the applicable history, in order to elucidate both the Story and the Madisonian positions. My research regarding this issue is being collected in book form. However, for present purposes, it should suffice to outline the Madisonian and Story views as to the intended meaning of the religious guarantees of the First Amendment, and then to apply those views to the public prayer issue. In the course of this statement, it will become clear that I strongly favor the Madisonian view of the intended meaning of the First Amendment. The Madisonian view would permit prayers in public schools

under certain circumstances. The Supreme Court appears, in my opinion, to be inclined to accept the Madisonian position regarding the prayer issue. Until the Court rejects that view, thereby repudiating the Constitutional history in its entirety, Congress should refrain from passing a prayer amendment.

Let me turn, then, to a summary of the Story and Madisonian views. Justice Story, himself a Madison appointee to the Supreme Court, summarized his view of the contemporaneous intent of the Framers of the First Amendment in § 1868 of his Commentaries on the Constitution as follows:

Probably at the time of the adoption of the Constitution, and of the . . . [adoption and ratification of the First Amendment] . . . the general, if not the universal, sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the rights of conscience, and the freedom of worship. Any attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.

In § 1870 of his Commentaries, Justice Story added that:

[T]he duty of supporting religion, and especially the Christian religion, is very different from the right to force the consciences of other men, or to punish them for worshipping God in the manner, which, they believe, their accountability to him requires.

And, finally, in § 1871, he asserts that:

The real object of the amendment was, not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government.

Thus, Justice Story believed that the Framers of the First Amendment must have intended to promote non-denominational Christianity, while tolerating other non-Christian religious sects. Other significant early

American jurists, including Chief Justice Marshall and Justice James Wilson of the United States Supreme Court, officially joined Justice Story in his conclusions in this regard.

As a matter of history, the Story view was hardly surprising. Many of the early colonists coming to America were members of minority Christian religious sects, who came to America to avoid religious oppression at the hands of the governmentally established churches of Europe. However, when they first came to America, in the early seventeenth century, these religiously motivated colonists generally established their own religious sect as the governing religious order of their respective colonies, without so much as tolerating dissenting religious views in their colonies. Nevertheless, by the latter part of the seventeenth century, a movement was underway, in Europe and in the colonies, to tolerate or permit religious exercises on the part of religious dissenters although this toleration rarely extended to Catholics, who were pejoratively referred to as "Papists." Typically, the dominant religious sect in the respective colonies received special benefits from the government, but other groups were increasingly permitted to exercise their religious beliefs. The Story position, with its special preference for nondenominational Christianity and its toleration of the religious exercises of partisans of other non-Christian religious sects, was clearly an outgrowth of this historical phenomenon. The only sense in which the Story view broke from this tradition was in its effort to establish nondenominational Christianity, rather than some specific denomination, rather than some specific denomination, as the national religion, thereby seeking to limit strife among existing Christian sects and establishments in the original

thirteen states.

While Justice Story argued that his position was accorded general, if not universal acceptance, among early Americans, he implicitly acknowledged in § 1868 of his *Commentaries* that there was yet another tenable position. I will refer to this other view as the Madisonian view, because he was its leading proponent.

Madison's views have often been misunderstood or misrepresented. Madison believed the free exercise of one's religious convictions could legitimately regulate only when its own survival would be "manifestly endangered" by the religious exercise in question. Most contemporary scholars, however, have concentrated upon Madison's views with regard to the establishment clause value and have largely ignored its relationship to his views regarding free exercise. This misplaced emphasis on the establishment clause value has led many commentators to argue that Madison contemplated a "rigid" or strict separation of Church and State. The assertion that Madison believed that government could never legitimately aid any or all religious exercise in the public sector is inaccurate. Madison believed that government could aid all religions in an equal fashion, thereby facilitating, accommodating or promoting voluntary religious exercises in public and private alike.

An examination of Madison's position supports my conclusions in this regard. In 1776, as a 26-year old legislator in the Virginia Assembly, James Madison made his first recorded public statement or proposal regarding the issue of religious liberty. George Mason had submitted his proposed Declaration of Rights for Virginia, which Declaration included a provision dealing with religious liberty followed the Christian-toleration model outlined above and

characterized as the Story view. Madison felt compelled to introduce a counter-proposal.

Madison proposed the following resolution regarding religious liberty:

That religion, or the duty we owe our Creator, and the manner of discharging it, being under the direction of reason and conviction only, not of violence, or compulsion, all men are entitled to the full and free exercise of it according to the dictates of conscience; and therefore no man or clays of men ought on account of religion be invested with particular emoluments or privileges, nor subjected to any penalties or disabilities, unless under color of religion the preservation of equal liberty, and the existence of the State be manifestly endangered.

Thus, for Madison the "free exercise" of one's religion was an inalienable right, a duty owed to God and not to man. While government could promote the free exercise of one's religion when it did so in an equal manner, it could only limit free exercise when the very existence of the state would be manifestly endangered if the government failed to regulate the particular exercise in question. This limitation on government regulation was double-edged. On the one hand, government could only burden one in the free exercise of their religion when the interests of the state were manifestly endangered. On the other hand, government could promote religious exercise generally, but it could not foster or prefer any particular religious sect or group of sects because that would effectively proscribe other religious groups or individuals in the exercise of their religious convictions.

Madison continued to adhere to this view throughout his life. Nearly a decade after the debate over the Virginia Declaration of Rights, the issue of religious liberty in Virginia was again raised. The Virginia Legislature considered a proposal sponsored by Patrick Henry entitled a "Bill

Establishing a Provision for Teachers of the Christian Religion," which is commonly referred to as the "Assessment Bill." Initially, in this regard, the Virginia Assembly passed a Resolution by a vote of 47 to 32 declaring, in pertinent part, that, "the people of the Commonwealth, according to their respective abilities, ought to pay a moderate tax or contribution for the support of the Christian religion, or of some Christian Church, denomination or communion of Christians, or some form of Christian worship." This proposal clearly embodied the Story position -- it preferred Christianity in a nondenominational sense, while only tolerating non-Christian sects. Madison vehemently opposed this resolution and the Assessment Bill.

Thereafter, debate ensued with regard to the Assessment Bill. Madison indicated the nature of his opposition to the Bill during the course of the debates. A warm opposition to the Assessment Bill developed, and, when a vote was taken on the Bill on December 23, 1784, it passed by a mere margin of 44-42. Given this changing sentiment, opponents of the measure were able to persuade the representatives to postpone the third and final reading of the Bill until the next general session and to print the Assessment Bill for dissemination to the public for their comments.

Madison led the opposition, circulating his Memorial and Remonstrance, in petition form, as a means of illustrating public opposition to the proposed Assessment Bill. Support for the Memorial and Remonstrance opposing the Assessment Bill was so great that the measure was not raised again when the Virginia House next met in general session.

The terms of the Memorial and Remonstrance constitute the single strongest articulation of the Madisonian position available. A summary of Madison's argument in that document is, therefore, warranted.

Madison began the Memorial and Remonstrance by reiterating his belief that the right of free exercise was an inalienable right:

The religion, then, of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is, in its nature, an inalienable right. It is inalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men; it is inalienable also, because what is here a right towards men is a duty towards the Creator. . . .

It is the duty of every man to render to the Creator such homage, and such only as he believes acceptable to Him. This duty is precedent, both in order of time and in degree of obligation, to the claims of civil society. Before any man can be considered as a member of civil society, he must be considered as a subject of the Governor of the Universe; and if a member of civil society who enters into any subordinate association must always do it with a reservation of his duty to the general authority, much more must every man who becomes a member of any particular society, do it with a saving of his allegiance to the Universal Sovereign. We maintain, therefore, that, in matters of religion, no man's right is abridged by the institution of civil society, and that religion is wholly exempt from its cognizance.

Having emphasized the inalienable nature of the right of free exercise, Madison turned next to the particular detriment to religious liberty that he felt would ensue if the Assessment Bill were to be adopted:

Who does not see that the same authority which can establish Christianity to the exclusion of all other religions may establish, with the same ease, any particular sect of Christians in exclusion of all other sects? That same authority which can force a citizen to contribute three-pence only of his property for the support of any one establishment may force him to conform to any other establishment, in all cases whatsoever?

When read together with his views regarding the Virginia Declaration of Rights in 1776, these statements help to elucidate Madison's understanding of what was meant by the phrase, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Congress, or a State, as in the case of the Assessment Bill, "establishes" a religion or group of religions, when it prefers one religious society to another or when it forces a person support any one particular religious establishment. The use of the language "respecting an establishment of religion," rather than "respecting the establishment of religion" in the First Amendment is significant in light of Madison's view in the Memorial and elsewhere. He did not oppose equal aid to all religions, because he understood that government should facilitate or accommodate the free exercise of religion; rather, he opposed preferential treatment, on the part of government, of any particular Christian faith to them." In a sense, therefore, it might be said that Madison's concept of equality contemplated an unregulated marketplace of religious ideas, in which the truth would ultimately win out. The extensive recitation of equality arguments in the Memorial illustrate that Madison's opposition to the Assessment Bill focused on the fact that the Bill failed to treat all religions with equal magnanimity and not upon the principle of a strict separation of Church and State in all instances.

Madison carried this same set of beliefs into the First Congress, which ultimately adopted the Bill of Rights. Madison originally introduced the Bill of Rights. His draft of a proposed

amendment protecting religious liberty provided as follows:

!7 The Civil Rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, nor on any pretext infringed.

No state shall violate the equal rights of conscience. . . .

This proffered amendment essentially summarized Madison's lifelong views regarding religious liberty.

Religious beliefs and worship (the inalienable right of free exercise) were to be placed beyond the reach of government. In order to help further these rights, no national religion was to be established, because such a governmentally sponsored religion violates the equal rights of conscience. In Madison's view, even the States should be prevented from denying or abridging the equal rights of conscience.

Madison never was able to get a majority of the representatives to apply his proposed amendment to the States, partly because they harbored an innate fear of the national government and partly because they were reluctant to abruptly dismantle existing state religious establishments. Nevertheless, both the Senate and the House debates reveal that his views were generally accepted otherwise.

Initially, the amendment regarding religious liberty and the Bill of Rights languished in inattention, as the House of Representatives debated other matters. Finally, however, Madison was able to persuade his colleagues to refer the matter of the Bill of Rights to Committee, where it would be considered preparatory to consideration on the part of the whole House. Madison himself was a member of that Committee of Eleven. Shortly

thereafter, the Committee reported out its draft of a Bill of Rights, which provided, among other things, that "no religion shall be established by law, nor shall the equal rights of conscience be infringed."

This apparent condensed version of Madison's original proposal immediately raised "some doubts as to the propriety of the mode of expression contained therein," on the part of Representative Sylvester, who opened the debate on the subject by disclosing his fear that the amendment might be "thought to have the tendency to abolish religion altogether." Much of what ensued in the debates constituted efforts on the part of the proponents of the amendment to assuage the doubts of Representatives regarding this point.

In his first statement on the floor of the House, during the course of the debate regarding the religion clauses, Madison essentially directed his comments to the objection that the establishment language in the amendment provided for a religion in public affairs. In this regard, Madison noted that he

. . . apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience. Whether the words are necessary or not, he did not mean to say, but they had been required by some of the State Conventions who seemed to entertain an opinion that under the clause of the Constitution, which gave Congress the power to make all laws necessary and proper to carry into execution the constitution, and the laws under it, enabled them to make laws of such a nature as might infringe the rights of conscience, and establish a national religion; to prevent these effects he presumed the amendment was intended, and he thought it was well expressed as the nature of the language would admit. (emphasis added)

Madison believed in the inalienability of the free exercise right and that government should not be

permitted to regulate religion, by fostering or preferring one religion or group of religions by proscribing or burdening another in a discriminatory manner. Furthermore, government could only burden religious exercise when the government's very existence would be manifestly endangered by its failure to so regulate.

Madison's role throughout the debates and his participation on the Conference Committee that submitted the language of the First Amendment, as we now know it, to both houses of Congress cannot be discounted. His influence on the final language ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . .") is plain. Clearly, the language was left ambiguous enough to satisfy advocates of the Story view, as well. Those supporting the Story view also found solace in the fact that their State religious establishments were left intact. Whether a majority of that First Congress or a majority of the people favored the Story view or the Madisonian view is an open question. Either view would, therefore, seem to be acceptable, as a matter of constitutional theory.

While it is unclear whether the First Congress adopted the Madisonian or the Story position, it is clear, as Justice Story noted in his Commentaries, that, "Any attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation [in Congress as well as among the electorate that ratified the First Amendment]." The fact that Congress never intended to promulgate a rigid or strict separation of Church and State is

made clear not only by the nature of the debates themselves, and the historical evidence preceding those debates, but also by the fact that the very first official act by Congress after the Bill of Rights was adopted was to recommend that a day of public prayer and thanksgiving be declared. That same First Congress also indicated its approval of legislation that would provide for the promotion of religion and morals in the schools of the western territories of the United States. Even James Madison ended his famous Memorial and Remonstrance with a public call for divine inspiration of a religious nature.

While many specific instances of opposition to the idea that the Framers of the First Amendment intended to forge a strict separation of Church and State or to create irreligion in the public sector could be enumerated, perhaps, the single, strongest support for the proposition that such a view would have been opposed by the Framers comes from the fact that the strict separation view was un-influential, if non-existent, during the first 150 years of our nation's history.

Having laid the historical foundation related to the intended meaning of the First Amendment, only one step remains before turning to a discussion of the President's amendment. That step is an examination of contemporary caselaw in light of the Madisonian and Story positions.

It is generally conceded that the Story view predominated in the states during our nation's first 150 years. In the mid-twentieth century, however, the federal courts began to hold that the Fourteenth Amendment incorporated certain selective rights contained in the Bill of Rights and, therefore,

made them applicable as against the states.

With its decision in Everson v. Board of Education, 330 U.S. 1 (1947), the Supreme Court declared that the establishment clause of the First Amendment was applicable against the states by virtue of the Fourteenth Amendment. The Court had previously held, in Cantwell v. Connecticut, 310 U.S. 296 (1940), that the free exercise clause of the First Amendment was applicable as against the states. These decisions incorporating the First Amendment's religious guarantees and making them applicable against the states would not have offended Madison, because he favored applying those guarantees against the states; but, the Court's interpretation of the historically intended meaning of the establishment clause would have been disturbing to Madison.

Unfortunately, in Everson, both Justice Black, for the majority, and Justice Rutledge, in dissent, supported their respective arguments with the same rationale. They argued that the spheres of government and religion should be strictly separated. In terms of historical support for their arguments, Justices Black and Rutledge both failed to recognize the Story and Madisonian views and opted rather to support their decisions with an ill-conceived emphasis upon a metaphorical phrase used by President Thomas Jefferson in a letter written to the Danbury Baptist Association on January 1, 1802. In that letter, Jefferson asserted that the establishment clause of the First Amendment contemplated a wall separating church and state. Relying upon this metaphor, the Supreme Court in Everson essentially declared, in dicta, that government aid to any particular religion or to all religions

generally was prohibited by the strict separation of Church and State mandated by the establishment clause of the First Amendment. The Court did briefly cite selective passages from Madison's Memorial and Remonstrance, but both Justices Black and Rutledge completely ignored the equality principle set forth in the Memorial. Read as a whole, the Memorial simply does not support the rigid separation of Church and State. Having misread the history, the Court in Everson burdened future courts with a faulty rationale.

Since it is the final decision or holding of the Court and not its dicta or argument that ultimately carries precedential weight, the Court may substitute a new rationale in establishment clause cases without overruling the actual decision in Everson. In recent years, there has been just such a retrenchment from the Everson rationale on the part of the Court. The Court has recognized that the "strict separationist" rationale espoused by Justices Black and Rutledge in Everson is impractical in application, because it necessarily fosters a conflict between the right to freely exercise one's religion, even in public, and the demand that government remain rigidly separated from matters of religion. Recently, in recognizing the problems attendant with the strict separationist view, the Court has articulated a more moderate, Madisonian-type position. The Madisonian approach is moderate at least in the sense that it falls somewhere between the Story approach and the strict separationist approach in Everson. It is not moderate in terms of protecting individual rights; rather, it is submitted that it is extremely libertarian in this regard.

If the Court applied Madisonian theory to the prayer in public school issue and to other related Church-State issues, it would be applying a historically

defensible stand that would maximize religious liberty, in both the public and the private sectors. The Court seemingly has recognized that it is not precluded from espousing such a view by existing decisions, and it appears increasingly inclined to apply the Madisonian view. A review of the Supreme Court's prayer decisions is very revealing in this regard.

In deciding Engel v. Vitale, 370 U.S. 421 (1962), the first prayer in public schools case decided by the Supreme Court, and Abington School District v. Schempp, 374 U.S. 203 (1963), a case dealing with Bible-reading and the recitation of the Lord's Prayer in public schools, the Supreme Court rejected the Story view. In both of these cases, adoption of the Story view would have permitted the practices involved. Under the Story view, a school district could permit voluntary recitation of a governmentally composed prayer like that involved in Engel, because the prayer was essentially nondenominational and students who did not want to participate in the recitation of the prayer could be excused. The voluntary Bible-reading and recitation of the Lord's Prayer practices in Schempp would also have been permitted under the Story view because of their nondenominational and voluntary qualities.

The voluntariness of the practices in both cases would be significant under the Story view. For the practices to be permissible, under the Story view, the students who belonged to minority religious sects or who otherwise were opposed to engaging in the religious practices involved would have to be permitted to excuse themselves from participation in the practices, in order to ensure that their religious convictions were not infringed by the practices. In other words, the minority

students' religious beliefs had to be tolerated, even though they didn't have to be given equal access or treatment in public. Toleration implied voluntariness under the Story view.

There were those who argued that the practices in Engel and Schempp effectively deprived students espousing minority religious beliefs of their right to choose. They argued that the excusal requirement placed a stigma upon such students by requiring that they expressly and conspicuously excuse themselves, despite potential peer pressure to do otherwise. Under the Story view, such "coercion" might vitiate the voluntariness of the excusal process, because it might be indicative of a lack of toleration of the free exercise rights of dissenters. However, as Justice Stewart pointed out in his dissents in both Engel and Schempp, there simply was no proof offered regarding this coercion issue. Therefore, absent such proof, the prayer recitation and Bible-reading practices in those cases would have been permitted under the Story view, as a means of aiding the majority in the expression of their religious views in the increasingly pervasive public sector. Thus, for Justice Stewart and for those espousing the Story view, the facilitation of religious exercise by the majority might fail to tolerate another individual or group's right to freely exercise their religious convictions, but proof of this fact was required before the majoritarian religious practice could be held to be unconstitutional.

Effectively, President Reagan's proposed prayer amendment would constitutionalize the Story view as to the prayer issue, by mandating that, "Nothing in this Constitution shall be construed to prohibit individual

or group prayer in public schools or other public institutions. No person shall be required by the United States or by any state to participate in prayer." There are some problems with the Story view generally, as well as with President Reagan's effort to amend the Constitution to provide essentially that the Story view would apply as a constitutional matter to the specific issue of public prayer. I will turn first to the general problems attendant with the Story approach and then will discuss particular problems related to the President's selective effort to apply the Story view in the public prayer context.

As Madison noted nearly 200 years ago, the most serious problem with the Story approach is that it prefers some religious, albeit in a non-denominational sense, over other religions. This inequality of treatment among religions demotes some religious beliefs to second class status, at least in terms of the receipt of governmental benefits. The Story view has the effect of placing a positive governmental imprimatur on some religious beliefs and second-class status upon other religious sects and beliefs.

Additionally, the Story approach, with its preference for the doctrinal core of the majority religious beliefs, permits the government to be unduly involved or entangled in religious matters. Under such a view, the government is essentially permitted to select, as a matter of representative democracy, which doctrines or modes of worship will be given preference and which religions will merely be tolerated. Such a practice would make state adoption of particular religious beliefs a matter of majoritarian consensus. The government should not be immersed in

religious doctrine in this sense. Furthermore, the specter of conflict and in-fighting among religious groups, in their efforts to be a part of this consensus, is almost as unappealing as is the fact that some groups will necessarily be deemed to be public outcasts.

There is also a certain inconsistency in the Story approach. It purports to adopt a nondenominational state or governmentally sponsored religion, while tolerating the exercise of the religious beliefs of members of other sects. When the government sponsors the religious doctrines of a particular religion or group of religions, it effectively proscribes or limits the rights of those who do not espouse that doctrine. A conflict, therefore, necessarily arises between the free exercise value of the majority and the free exercise rights of minorities.

Furthermore, in a sense, the Story view places the marketplace of religious ideas in artificial imbalance, by subsidizing or otherwise showing preference for certain religious ideas to the exclusion of others. While it is agreed that all religious ideas cannot, as a practical matter, receive equal treatment or consideration in the marketplace of ideas, it is nevertheless arguable that the government should not be permitted to create an artificial imbalance (particularly one that favors the strongest rather than the weakest religious voices) in the marketplace of religious ideas. If the government extends a benefit to one religion, it should make the same benefit available on equal terms to all religious sects. Just as government should be precluded from adopting the value of secular humanism or public irreligion as its predominant value, it should also be prevented from adopting any majoritarian religious

value as its own.

Having discussed the Story position in general terms, it is also appropriate to specifically analyze President Reagan's proposed Voluntary Prayer Amendment. The use of the voluntariness language in the second sentence of the amendment may create problems. When the State adopts and implements the views of a majority of its citizenry, can it fairly be said that an excul provision will assure voluntariness? The voluntariness language of the President's proposed amendment may provoke difficulties of interpretation and analysis that may place the issue back in the hands of the Supreme Court or Congress. It is conceivable, for example, that the Court could find a state composed nondenominational prayer to be recited by school children, like that in Engel, to be unconstitutional in its application, even after adoption of the amendment, on the ground that it effectively required participation by minority children (particularly at the elementary and secondary school levels). In this sense, proof could be offered to the effect that peer pressure exists and demands conformity to the practice or threatens social ostracism. As such, this prayer practice in application would constitute a cruel and, perhaps, unconstitutional choice for a young child.

The preceding objection to the President's amendment is hardly new. However, there are other objections. By expressly limiting its terms to the public prayer issue, the amendment is too specific. By its terms, the amendment would prevent the Court from setting aside voluntary prayer practices in public, but it does not purport to otherwise change the underlying rationale used on occasion by the Court in deciding establishment clause cases. In this

regard, I believe, from the Administration's point of view, that the major perceived deficiency with the Court's decisions in this area has more to do with the Court's underlying rationale (the strict or rigid separationist rationale that mandates irreligion in the public sector) than with any particular decision by the Court. The amendment, however, deals with the problem in a piecemeal fashion. It deals solely with the prayer issue, leaving other Church-State issues to be disposed of under the existing rationale (whatever that may be). Such a piecemeal solution would be acceptable, if the issue was legislative in nature, but it is not. Amendments to the Constitution have a permanence not normally attributed to legislation. A Constitution cannot be easily altered every time a new and perhaps unanticipated issue arises. A Constitution deals best with principles, rather than with specific issues. To be effective, therefore an amendment must be drafted accordingly. The President's amendment is deficient in this regard. For example, let us assume that the specific prayer amendment was adopted and ratified. Presumably, voluntary public prayer would then be permitted. However, the Court could nevertheless find nativity scenes, all reading from the Bible, and the public display of crosses or other religious emblems to be unconstitutional; prayer might be permitted, but the singing of religious hymns, participation in public religious exercises, or the public expression of one's religious faith might be forbidden. To salvage such practices, under the preceding scenario, it would be necessary to draft yet another amendment or a series of amendments to cover the practices desired to be salvaged. It is, therefore, recommended that if Congress desires

to adopt an amendment permitting the recitation of non-denominational or other prayers in public, it should do so by passing a general amendment.

Additionally, if the President's amendment is adopted and submitted to the states for ratification, the Supreme Court might avoid the prayer issue in the interim, while awaiting action by the states. This would be particularly disturbing, given the Court's current activity in the Church-State area.

In addition to the legal arguments that mitigate against adoption of the President's proposed amendment, George Will raised a significant practical argument in his column, "Opposing Prefab Prayer," appearing in Newsweek on June 7, 1982. Will opposed the idea of having government involved in the business of preparing prayer for recitation in public. He argued that, "When government acts as liturgist for a pluralistic society, the result is bound to be a purée that is tasteless, in several senses." As such, nondenominational prayers are often so devoid of religious controversy that they are equally devoid of real religious significance and, therefore, do little to enhance genuine religious devotion or exercise.

Not surprisingly, there is, in my opinion, a better way to preserve meaningful public prayer. This can be done by applying the Madisonian view to the issue. Furthermore, since the Supreme Court currently seems inclined to adopt the Madisonian position, any amendment to bring about such a result may be unnecessary at this time.

In analyzing the prayer cases, it is likely that Madison would have reached the same result as the Supreme Court did in Engel and Schempp, although he undoubtedly would have relied upon a different rationale. The Engel and Schempp

practices would both be unacceptable to Madison. For Madison, the practices would constitute adoption of a particular mode of worship or adoption of the trappings of particular religious sects, and would, therefore, benefit one religion or group of religions, while proscribing another. The fact that these practices were to be essentially nondenominational would not save them, in Madison's view. As long as there were people who were offended or excluded as a matter of their religious belief or conscience by the governmental adoption of such doctrinally specific practices, Madison would hold the practices to be improper. For Madison, the establishment clause insured that government could not discriminate among religions or religious beliefs and doctrine, by burdening some beliefs while conferring special benefits on others.

However, those who favor some form of prayer in public schools need not despair. An analysis of the cases before the Supreme Court last term (the 1981-1982 term) illustrate that, under the Madisonian view, not all public prayers would be prohibited. An examination of those cases is in order.

In its first act of precedential weight, as to the public prayer issue, since its decisions in Engel and Schempp approximately 20 years ago, the Supreme Court during its past term summarily affirmed the Fifth Circuit's decision in Karen B. v. Treen, 653 F.2d 897, summ. aff'd., ____ U.S. ____ (1982). In the Treen case, a Louisiana statute provided that a school board could authorize school officials to allow classroom teachers to inquire whether any student wishes to volunteer to offer a short prayer at the commencement of each school day. If no student

volunteered, then the statutory scheme would permit the teacher to offer a prayer or, alternatively, to continue the day's activities without a prayer. The prayer period was to be followed by a moment of silent meditation. The prayer practice was attacked; the meditation practice was not questioned. The Court of Appeals for the Fifth Circuit held that the prayer practices permitted by the statute and the regulations implementing those statutory provisions in the Jeffersonian Parish were violative of the First Amendment. The Supreme Court, in turn, summarily affirmed the Fifth Circuit's decision. However, in summarily affirming the decision, the Supreme Court did not issue a written opinion. Therefore, it is unclear what reasoning or rationale the Court adopted in support of its decision.

Additionally, speculation as to how the Court might decide subsequent prayer issues arguably increased as a result of the Court's actions last term in two other religion cases [Brandon v. Board of Education, 635 F.2d 971, cert. den., ____ U.S. ____ (1981), pet. reh. den., ____ U.S. ____ (1982), and Widmar v. Vincent, 635 F.2d 1310, ____ U.S. ____ (1981)] and in a freedom of expression case [Board of Education v. Pico, 638 F.2d 404, ____ U.S. ____ (1982)].

At essentially the same time as it was deciding the Treen case, the Supreme Court was denying certiorari in the Brandon case, another prayer in public schools decision. Evidently, in the eyes of the Court, the facts in Brandon differed significantly from the facts in the Treen case, or the Court would simply have summarily affirmed the Brandon case in conjunction with its decision in Treen. In Brandon, a group of high school students organized a group

called "Students for Voluntary Prayer" and sought permission from the school's principal to conduct communal prayer meetings in a classroom immediately before the school day commenced. The student group did not seek faculty supervision. It also stated that its activities would remain voluntary and would not conflict with other school functions. First the principal and then the superintendent both, respectively, refused the student group's request to meet on campus. The school board then affirmed the denial of the student group's request, as well, and the students pursued the matter in federal court, arguing that the school's refusal violated their First and Fourteenth Amendment rights of free exercise of religion, freedom of speech, freedom of association and equal protection. Both the District Court and the Court of Appeals for the Second Circuit held that the granting of the student's request would have violated the establishment clause of the First Amendment. Therefore, the courts affirmed the school's action in denying the request. Exercising its purely discretionary right to do so, the Supreme Court refused to hear the matter.

For present purposes, it is sufficient to inquire as to why the Supreme Court handled the Brandon and Treen cases in the way that they did. Originally, in his opinion for the seven member majority in the Widmar case last term, in which the Court upheld certain student religious activities in public university facilities against an establishment clause challenge, Justice Powell gave what may have been a minor clue as to why the Court declined to hear the Brandon case, when he specifically cited Brandon in footnote 13 of his opinion, stating that, "This case [Widmar] is different from the cases [e.g.,

Brandon) in which religious groups claim that a denial of facilities not available to other groups deprives them of their rights under the Free Exercise Clause." See Widmar v. Vincent, 50 LW 4062, fn. 13 at 4065 (1981). However, Justice Powell deleted the reference to Brandon from footnote 13 in the official report of the Widmar case. See, Widmar v. Vincent, ____ U.S. ____, 70 L. Ed. 440, fn. 13 at 449-50 (1981). There is no indication on Justice Powell's part as to why he deleted the Brandon citation, while leaving the substance of the footnote unchanged.

Justice Powell may have deleted the Brandon citation from footnote 13, because there were problems with the record in the Brandon case and the Court (after deciding Widmar) denied certiorari in Brandon. There was evidence on the record in Brandon indicating that non-religious groups were in fact given access to school facilities, while religious groups were prevented from gaining access to school facilities on equal terms. As such, the Brandon case would not support Justice Powell's assertion that Widmar "was different from cases in which religious groups claim that the denial of facilities not available to other groups deprive them of their rights under the Free Exercise Clause." Id. In other words, Justice Powell may have been arguing that the equality of access issue was not present in Brandon, when in fact it was. Therefore, of the Brandon citation may have been deleted simply to correct an error in citation. There may also have been more substantive reasons for deleting it, but it remains clear, after Widmar, that a majority of the Court does support the principle of equality of access for religious and non-religious groups, at least at the University level. This, in turn, has

potential ramifications for the prayer issue.

Therefore, even though the citation to Brandon in Widmar was deleted, a brief summary of both the Widmar and Pico decisions, decided last term, is in order. In Widmar, with only Justice White dissenting, the Court held that where the University of Missouri had created a limited public forum for student groups, it could not prohibit a student religious group from meeting on campus, because such a regulation would discriminate against students' First Amendment rights of religious exercise and expression. In Widmar, the University of Missouri had refused a registered student religious organization access to University facilities available to other nonreligious student organizations, on the ground that permitting the students to meet and engage in religious worship or exercise on campus would violate the strict separation of Church and State mandated by the establishment clauses of the state and federal Constitutions. The Court rejected this argument, holding rather that the state could not prevent the students from engaging in their religious expression on an equal basis with nonreligious expression on the part of student groups. This holding would seem to imply that religious exercise must, at a minimum, be treated on an equal basis with other forms of nonreligious expression in the public sector. However, in footnote 14 of his opinion for the Court in Widmar, Justice Powell left open the issue of how this equality of access principle would apply in the secondary and elementary public school context.

In this sense, while the Pico case is not a free exercise case, it nevertheless offers minor enlightenment as to how the Court views First Amendment rights

in the school context. In Pico, a case dealing with the removal of certain books from the shelves of a public school's library, the Court was intensely divided. In fact, seven separate opinions were written by members of the Court. In Pico, five of the Justices did agree that the matter should be remanded or sent back to the lower court to ascertain whether the students' First Amendment rights had been violated by the content-related removal of certain books from the school's library and to determine whether the students were denied due process with regard to the nature of the removal by the school board. Two general conclusions can be drawn from the case, when all the opinions are read together: (1) all of the Justices, albeit in varying degrees, would give local school boards deference in such matters, even though the students' First Amendment rights are implicated; and (2) all of the Justices, albeit again in varying degrees, would recognize that students have First Amendment rights that apply in the elementary and public school context.

Treen, Brandon, Widmar and Pico, collectively suggest that the Court is likely to hear the "right" prayer case in the future. Furthermore, it appears from a reading of these cases, together with other recent decisions of the Court regarding religious liberty that the Court would adopt a position very near that set forth in the Madisonian view in such a case.

Under the Madisonian view, the Treen decision was correctly decided. The prayer practices in Treen would be objectionable in a Madisonian sense because of the critical role given to the teacher, a particularly influential official of the State in the public educational context. Under the facts of the Treen case, the teacher could initially select a student to pray from among a group of volunteers.

It is evident that, in fulfilling this responsibility, the teacher could, either consciously or subconsciously, select particular students, with particular religious beliefs, to pray. Minority students, who either intentionally or unintentionally were precluded or believed that they were precluded from leading the voluntary prayer on a routine basis, might feel that their views were disfavored by the teacher and the school. The provision would also permit the teacher to pray under certain circumstances. In doing so, the teacher would be placing the school's imprimatur on a particular form or mode of worship. If the teacher declined to pray, the very act of declining to pray might also imply that religion was disfavored in a general sense. Under the Madisonian view, the State and its officials cannot prefer one religion over another. As a practical matter, the Treen practice might have that effect.

Additionally, the Louisiana practice in Treen would be objectionable to Madison because the young and impressionable student with minority religious views might be put to a cruel choice between submitting to the prayers of his or her fellow students adhering to the majority faith and thereby maintaining a positive peer relationship with those students, or volunteering to lead the prayer on a regular basis, thereby incurring the potential or perceived disfavor, wrath or even ostracism of his or her peers. Where present, this cruel choice violates the right of free exercise of those minority students. Madison would not condone this.

Madison would clearly have supported a moment of silent meditation or prayer at the commencement of each school day. This practice would facilitate each individual in the free exercise of his or her

religion. However, the meditation practice was not at issue in Treen; therefore, its constitutionality remains an open question, although I would argue that the Court is certainly likely to permit such a practice. In fact, it is arguable that a student might, as a constitutional matter, demand that a school district permit such a practice, as a means of facilitating his or her right of free exercise.

The Widmar decision is also particularly consistent with the Madisonian view. Widmar required the same equality of access on the part of all religious groups that Madison advocated. Unlike the Story position, the Court's decision in Widmar had the effect of facilitating all religious expression equally and required that religious expression be accorded the same access to public benefits as non-religious expression. There was no particular preference given to any religious group or groups nor was there any discriminatory burden placed on any religious group by the equality of access principle articulated in Widmar.

The Brandon decision, on the other hand, presented unique procedural problems for the Court. As evidenced by Justice Powell's subsequently deleted reference to Brandon originally appearing in footnote 13 of his opinion for the Court in Widmar, the facts in Brandon were somewhat unclear as to whether student expression was regularly facilitated in the school district, as a matter of policy. This deficiency in the record may have influenced the Court's decision to deny certiorari in Brandon, without reference to its substantive merits. This conclusion seems to have been borne out by the fact that the Court decided Treen as a substantive matter, while simultaneously declining to decide the Brandon case.

It is plain, as well, given the severe disagreement among the Justices in Pico, that the Court probably acted with prudence in denying certiorari in Brandon, thereby avoiding a conflict in the prayer context between the interests of the school district and the rights of the school children. The Court may, therefore, have recognized or anticipated the potential for another serious split in Brandon, and it is clear that the Court needs, where possible to maintain a sense of unanimity when it renders such a First Amendment decision. Such unanimity is important for the purpose of clearly enunciating the applicable principles for school districts and to allay fears that the consensus supporting the decision is so fragile that the slightest shift in political winds or in the composition of the Court would render it ineffectual. In this sense, the Brandon case may simply have been the "wrong" case in which to render a meaningful decision regarding the prayer issue. The "right" case, in this light, would be a case that presented a factual situation in which a school district permitted (rather than refused, as in Brandon) all religious and nonreligious student groups or organizations equal access to school facilities. The problems of government preference present in Engel and Schempp should not be present in such a case; the critical role of the teacher in Treen should be avoided; and, the problems with the record, as well as the conflict between the students' First Amendment rights and the school district's decision present in Brandon should be avoided.

It is submitted that the Supreme Court should soon have just such a case before it: Lubbock Civil

Liberties Union v. Lubbock Independent School District, 669 F.2d 1038, pet. reh. den., 680 F.2d 424 (5th Cir. 1982). In the Lubbock case, for at least 10 years, the school district had permitted activities such as Bible-reading over the school's public address system, prayers in classrooms led by a teacher, the distribution of Bibles on campus by the Gideon Society, and religious assemblies during the school day. In 1979, the Lubbock Chapter of the American Civil Liberties Union filed suit against the school district's promotion of those religious practices. In 1979, after receipt of additional complaints, the school district promulgated further rules and regulations in an effort to make the practices more palatable as a Constitutional matter, but the ultimate adoption of those policies in 1979 did not cause the practices of Bible-reading, religious assemblies and daily prayers, led or directed by school personnel, to be terminated on campus during school hours. Therefore, the matter proceeded to trial.

However, in yet another effort, in 1980, evidently designed to rectify matters, the school board fashioned a new policy regarding religious and nonreligious exercises or expression in public schools within the district. The plaintiff in the case, however, continued to maintain that the school district was acting unconstitutionally, despite the policy changes. In particular, the plaintiffs disagreed with Paragraph 4 of the new, 1980 policy, which provided that:

The school board permits students to gather at the school with supervision either before or after regular hours on the same basis as other groups as determined by the school administration to meet for any educational, moral, religious or ethical purposes so long as attendance at such meetings is voluntary.

Given this continuing disagreement between the parties, the matter was tried at the Federal District Court level.

At the trial, substantial evidence was offered as to past (pre-1980) practices, but little evidence was introduced concerning the meaning of the new 1980 policy. The District Court held that the pre-1980 practices of the school district were unconstitutional, but also held that the 1980 policy, including Paragraph 4, was not facially unconstitutional. The trial court also held that there had been no showing of bad faith on the part of the school district, such as would warrant the awarding of punitive damages. However, nominal damages were awarded for the pre-1980 Constitutional violations.

The Court of Appeals for the Fifth Circuit overruled that portion of the District Court's decision which held the 1980 policy to be Constitutional. While the Court of Appeals recognized that the case presented by the 1980 policy was one of first impression (one which had not previously been directly addressed by any federal appellate court), it nevertheless held that the policy embodied in Paragraph 4 violated the establishment clause of the First Amendment. The Court based its decision, in this regard, largely upon the strict separation of Church and State rationale.

The school district petitioned for a rehearing of the matter by the entire Court of Appeals for the Fifth Circuit. Despite a strong dissent, joined by four of the Judges of the Fifth Circuit, the petition for a rehearing en banc was denied by a majority of the Judges for the Circuit.

In his dissent regarding the denial of the petition for a rehearing, Judge Reavley stated, for himself and the other three judges who joined with him, that:

I fully understand and completely agree with Judge Kaufman when he objected in Brandon to giving impressionable children the appearance that the state places its imprimatur upon any faith or religious practice. We should not forget, however, that the young student may also be given the impression that our government and the courts and the schools are hostile to all religious beliefs and practices, I would consider that a very great wrong to the children, to the Constitution and to the nation.

Judge Reavley's dissenting view is consistent with the Madisonian position. The majority opinion was not.

Certainly, the Lubbock School District's pre-1980 record is very unfortunate and should not be countenanced. However, it must be recalled that the District Court did not find, as a matter of fact, that the school district acted in bad faith. Presumably, therefore, the school district acted out of ignorance -- an ignorance fueled in part by the Supreme Court's own failure to enunciate clear standards in this area of the law. With the formulation of its 1980 policy, including Paragraph 4, under the Madisonian view, the school district took the final step necessary to bring its actions regarding the facilitation of free exercise of religion and other rights of expression in the school district into conformity with historical, Constitutional standards.

Paragraph 4 comports with the Madisonian belief that voluntary efforts to exercise one's religious convictions in public should be accommodated or facilitated by government. Furthermore, the policy articulated in Paragraph 4 does not prefer one religion or any form of religious or ethical doctrine or mode of worship over any other. There wasn't any evidence offered to prove that the 1980 policy somehow inhibited anyone else's First Amendment

rights. Plainly, therefore, if the Supreme Court intends to adopt the Madisonian view with regard to public prayer, it will have a proper vehicle for doing so, when the school district in the Lubbock case files its petition for certiorari with the Court.

The only unsatisfactory element of the Lubbock case is the poor Constitutional track record of the school district prior to 1980. However, even this feature of the case could be turned to advantage by the Supreme Court in the drafting of its opinion. It will enable the Court to further clarify which public prayers are permissible, by upholding the benevolently neutral policy articulated in Paragraph 4, while simultaneously emphasizing what was wrong with the prior practices. By doing so, the Court can continue its break with the Story view and can also affirm its fidelity to the remaining legitimate historical view, the Madisonian view. This fidelity to the Madisonian view would Constitutionally legitimize an otherwise prudent decision on the part of the Court. Additionally, the facts of the Lubbock case would enable the Court to emphasize that violations of clearly enunciated Constitutional standards will not be countenanced by the Court and will potentially give rise to punitive as well as compensatory damages or relief. Thus, school districts will be placed on notice that, having enunciated clear standards, the Court will stringently enforce those standards.

If, on the other hand, the Court refuses to take the Lubbock case or take it and renders a decision against the school district, I would then, but only then, join with those who advocate an amendment to the Constitution to clarify and reassert the meaning attributed by the Framers to the language of the First Amendment. If the Court

decides against the school district, it would, perhaps unwittingly, be repudiating its only remaining historical claim to legitimate constitutional adjudication in the public prayer area, even though it would undoubtedly endeavor to couch its decision in historical terms. In rejecting both the Madisonian and the Story views, the Court would at least frame the issue for Congress. Congress could decide, in adopting or refusing to adopt an amendment, whether it preferred the Story, the Madisonian or the strict separationist solution to the problem.

I should add that, while I have argued that the proposed prayer amendment is premature, at least until the Court acts upon the petition for certiorari in the Lubbock case, I nevertheless believe that hearings by the Judiciary Committee are in order. During the course of such hearings, Congress would do well to examine the applicable history and to seek to apply the results of that examination to the problem of public prayer, specifically, and to the issue of Church-State relations, generally. In that process I believe that Congress will find the Madisonian approach to be most attractive, because it maximizes individual religious liberty, while minimizing governmental religious discrimination.